

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI.

MARCH TERM, 1873, AT ST. LOUIS.

CHARLES S. RANNELS by his Curator R. M. RENICK, Appellant, *vs.* DAVID WATSON RANNELS, *et al.*, Respondent.

1. *Lands and land titles—Trespassers—Title by occupancy—Color of title.*—A mere trespasser can acquire title only to that portion of a tract which he occupies ; to maintain an action against parties trespassing on another part of the tract, he must have actual possession of a part of the tract with color of title to the whole.
2. *Lands and land titles—Limitations, Statute of—Occupancy—Color of title—Writings and acts in pais.*—Whatever title would authorize a party in possession of a part of a tract to maintain an action against a wrong-doer on the balance of the land, would be a sufficient color of title under the Statute of Limitations against the real owner ; and this color of title may be created by an instrument of writing or by an act *in pais* without writing.
3. *Land and land titles—Color of title—Acts in pais.*—Where a man made a verbal gift of a defined tract of land to his sister, had it surveyed for her, and put her into the possession under this survey and the description in his own deed, *Held*, she was in possession of the whole tract under color of title.

Frank J. Bowman, for Appellant.

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI.

MARCH TERM, 1873, AT ST. LOUIS.

CHARLES S. RANNELS by his Curator R. M. RENICK, Appellant, *vs.* DAVID WATSON RANNELS, *et al.*, Respondent.

1. *Lands and land titles—Trespassers—Title by occupancy—Color of title.*—A mere trespasser can acquire title only to that portion of a tract which he occupies ; to maintain an action against parties trespassing on another part of the tract, he must have actual possession of a part of the tract with color of title to the whole.
2. *Lands and land titles—Limitations, Statute of—Occupancy—Color of title—Writings and acts in pais.*—Whatever title would authorize a party in possession of a part of a tract to maintain an action against a wrong-doer on the balance of the land, would be a sufficient color of title under the Statute of Limitations against the real owner ; and this color of title may be created by an instrument of writing or by an act *in pais* without writing.
3. *Land and land titles—Color of title—Acts in pais.*—Where a man made a verbal gift of a defined tract of land to his sister, had it surveyed for her, and put her into the possession under this survey and the description in his own deed, *Held*, she was in possession of the whole tract under color of title.

Frank J. Bowman, for Appellant.

If Chas. S. Rannels made a parol gift of the premises in question to Mary D. Rannels, then by operation of law an estate at will—no other and no greater estate—was thereby vested in Mary D. Rannels, and she became and was a tenant at will of Chas. S. Rannels, and as such tenant could not hold adversely to him. (W. S., 665. Wash. on Real Prop. 144 note 1; *Cole vs. Roe*, 39 Mo., 411; *Jackson Exdem Van Allen vs. Rogers*, 1 Johnson's cases 341.)

The relation of landlord and tenant may be created by implication, and the law will in general imply the existence of a tenancy wherever there is an ownership of land on the one hand and an occupation by permission on the other; and rent is not essential, for from favor or other cause a tenancy may be created without a reservation of rent. (Tayl. Landl. and Ten. p. 13, § 19; *id.*, § 14, p. 10.)

The tenant cannot dispute the title of the landlord. (*Greno vs. Munson*, 9 Vernr., 39.)

The cases decided in the States of Vt. Mass. and Conn., as to party holding adversely under parol gift do not apply, as the statutes of those states differ widely from our own. By the statutes of Vermont and Connecticut such parol gift would be simply void. (Comp. Stat. of V. I. Chap. 64, Section 1, page 389; See Gen. Stat. of V. I., 1863, Section 1, Chap. 66, p. 452; Stat. of Conn. 1835, Title, 40, § 1, Chap. 59, § 29, Rev. Stats. of Mass. 1836.)

"Estate at Will" and "Tenancy at Will," are identical. Every estate at will by implication of law is a tenancy at will. (*Kents Com.*, 5th Ed., p. 100.)

When the relation of landlord and tenant is once established, it attaches to all persons who succeed to the possession of the premises through or under the first tenant. (Taylor on Ejectment and Adverse Enjoyment, page 208.)

The claim of title must be adverse to that of the claimant and not in any manner subservient to the title of the latter; and to make the possession of a party a bar in the action of ejectment, strict proof is necessary that it was hostile in its inception. (*Kirk vs. Smith*, 9th Wheat pp. 254, 555; Tayl.

Rannels, by curator, v. Rannels et al.

Eject. and Adv. Enj. Chap. 49, p. 874-5; Brandt vs. Ogden, 1 Johns. 156; Jackson vs. Parker, 3 John's cases 124; Jackson vs. Sharp, 9 Johns, 163.

Glover and Shepley, for Appellant.

I. The defendants never had any right to the premises in dispute, except a tenancy at will. (1 W. S., 655, § 1.)

As the defendants always claimed by an oral gift, and by livery of seizin only, they claimed a tenancy at will, and no possession in connection with such a claim could be adverse.

An oral gift is not color of title, because the law declares its legal effect to be a tenancy at will, and it does not purport to give title, but the contrary. In order to put the statute of limitations in motion in order to make the possession of defendants adverse, they should have claimed, not under an oral gift, the meaning of which is a tenancy at will, but independent of the oral gift, that is, they should have claimed title and repudiated any oral gift and tenancy at will.

The entry of defendant having been as tenant at will, was not adverse to Charles S. Rannels until a claim of title was set up by defendants. (Jackson vs. Parker, 3 John. cas., 124; Brandt vs. Ogden, 1 Johns., 156; Den vs. Edmondson, 1 Iredell, 152; Chilton vs. Niblett, 3 Hump., 404; Jackson vs. Van Allen, 1 John. cas., 34.)

Color of title is said to be "some written instrument like a deed, levy of execution, decree of court or the like, in which the piece is described by metes and bounds." (3 Washb., 124; City vs. Gorman, 29 Mo., 593; Fugate vs. Pierce, 49 Mo., 441; Shackelford vs. Bailey, 35 Ill., 391; Jackson vs. Camp., 1 Cowan, 605; Haynes vs. Jones, 2 Head., 372.)

If the tenancy at will was color and claim of title, nothing but an actual possession would oust the true owner, Charles S. Rannels. As to so much then of the tract as defendants failed to show themselves in the actual possession of for 10 years Charles S. Rannels remained in possession all the time. (McDonald vs. Schneider, 27 Mo., 405; Griffith vs. Schmendenman 27 Mo., 412; City of St. Louis vs. Gorman, 29 Mo.,

Rannels, by curator, v. Rannels et al.

603; Miller vs. Shaw, 7 S. & R., 129; Barr vs. Gratz, 4 Wheat., 224.)

The defendants could not take title by means of having possessed a certain portion of the tract, unless they showed what portion it was. (Adams Eject., 582, 585; Doe vs. Campbell, 10 John., 477.)

An adverse possession must be notorious, continuous and exclusive. (Fugate vs. Pierce, 49 Mo., 441.)

B. Duke and Dryden & Dryden, for Respondents.

I. A written conveyance is not necessary to give color of title.

An entry is by color of title when it is made under a *bona fide* claim to a title existing in another, whether the claim rest in matter of *parol* or in writing. (Ang. on Lim., 437, § 26; McCall vs. Neely, 3 Watts, 72; Hunter vs. Parsons, 2 Bailey, 59; Jackson vs. Whitbeck, 6 Cow., 632.)

A holding by one who enters under a *parol* gift of land, will be sufficient to give him an effectual title against the donor. (3 Washb. on Real Prop. 143, 144; Sumner vs. Stevens, 6 Mete., 338.)

ADAMS, Judge, delivered the opinion of the court.

This was ejectment for a tract of land near Laclede Station on the Pacific Railroad in St. Louis County.

The plaintiff showed a clear paper title in himself, and the defendants stood upon the Statute of Limitations.

The evidence conduced to show that the plaintiff purchased the land in dispute for the express purpose of giving it to his sister, Mrs. Mary Eliza Rannels, wife of D. Watson Rannels, and mother of the other defendants. That he bought the land and took a deed in fee to himself, in which the land in dispute was described by metes and bounds, and that he showed the land to his sister and she was pleased with it, and there upon the land was surveyed, and under this survey and the description in the deed the plaintiff made a verbal gift of the land to his sister and put her into possession; or rather, before taking actual possession, a house was built for her into which

Rannels, by curator, v. Rannels et al.

she and her family moved, and remained there up to her death in 1857, and the family consisting of the defendants, have remained there ever since. That she and they occupied the house, and exercised open and notorious acts of ownership over the remainder of the tract up to her death; and the remainder of her family since her death.

The evidence showed that the defendant had maintained possession for more than ten years before the commencement of this suit.

The instructions given and refused raised the only questions that have been discussed by counsel, and which we are called upon to consider, that is whether the verbal gift and delivery of possession under the same by the plaintiff to his sister, constituted a color of title to that portion of the tract of land not enclosed nor in actual possession, so as to put in force the Statute of Limitations.

A mere trespasser who enters upon land without any pretense of title, cannot by any contrivance such as surveying the land and claiming it to the boundaries of such survey, extend his possession beyond his actual enclosure. Such a wrong doer would have no right of action against other trespassers on the same tract outside of his enclosure. To maintain an action against outside trespassers there must be actual possession of a part of the tract, with color of title to the whole. In my judgment whatever title would authorize a party in possession of a part of a tract to maintain an action against a wrong doer for a trespass on the remainder of the land, would be a sufficient color of title under the statute of limitations as against the real owner. It is not necessary that this color of title should be created by deed or other instrument of writing. It may be created by an act *in pais* without writing. In *McCall vs. Neely*, 3 Watts, 69, Judge Gibson said, "the words, 'color of title' do not necessarily import the accompaniment of the usual documentary evidences, for though one entering by a title depending on a void deed would certainly be in by color of title. It would be strange if another entering under an erroneous belief that he is the legitimate heir of the

person last seized, should be deemed otherwise, and it would be stranger still if his allience were deemed to have more color of title than he had himself. To give color of title therefore, would seem not to require the aid of a written conveyance, or recovery by process and judgment, for the latter would require it to be the better title. I would say that an entry is by color of title when it is made under a *bona fide* and not pretended claim of title existing in another."

The Supreme Court of Indiana, in *Bell vs. Longworth*, 6 Ind., 273, denied the right of a mere intruder to extend his possession beyond the limits of his actual enclosure; holding however, that a conveyance was not necessary to give color of title, that court says: "But when a party is in possession pursuant to a state of facts which of themselves show the character and extent of his entry and claim, the case is entirely different, and such facts whatever they may be in a given case, perform sufficiently the office of color of title. They evidence the character of the entry and the extent of the claim, and no colorable title does more." And the same doctrine was afterwards maintained by that Court in *Vanceleave vs. Milliken*, 13 Ind., 105. See also *Sumners vs. Stevens*, 6 Metc. (Mass.) 337; *Ashley vs. Ashley*, 4 Gray, (Mass.) 197; *Angel on Limitations*, 406.

In the *City of St. Louis vs. Gorman*, 29 Mo., 593, cited and relied on by the learned counsel for appellant, Judge Scott did not mean to be understood that a deed or other written instrument was necessary to create color of title. He was very careful not to convey that idea. His language imports that there may be cases where color of title is conveyed without writing. He sums up in these broad and comprehensive terms: "When we say a person has color of title, whatever may be the meaning of the phrase, we express the idea at least that some act has been previously done or some event transpired, by which some title good or bad, to a parcel of land of definite extent, has been conveyed to him." In the case under review, there was an act performed *in pais* by which color of title was conveyed by the plaintiff to his sister. He made her a verbal gift of a

defined tract of land, had it surveyed for her, and put her into the possession under this survey and the description in his own deed. This was equivalent to livery of seizin at common law, whereby a freehold estate was conveyed without any writing whatever. But the statute of frauds declares that the ancient conveyances by parol or livery of seizin, shall have the force and effect of leases, or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force.

The statute does not declare such parol gifts to be leases at will, but that they shall have no other or greater force. They have not the nature of a tenancy at will. The owner's possession, unlike that of a tenant at will, is adverse to that of the true owner from its very inception. But the estate created has no other or greater force than a tenancy at will, because the donor may at any time put an end to the gift by asserting his legal rights just the same as the lessor can in a tenancy at will. Still until the donor resumes the possession, the donee is there as owner as to all the world except the true owner. By the verbal gift and livery of seizin there was a complete transmutation of the possession, so as to enable the donee to maintain an action against all persons invading any part of the premises, except the rightful owner. This in my judgment was a sufficient color of title. I am not satisfied that the statute of limitations of 1847, to quiet land titles, enacted a different rule than what prevailed before in regard to color of title. I am inclined to think it was only declaratory of what the law was, and has been since its passage. In arriving at these conclusions, I have not overlooked the cases of *Fugate vs. Pierce*, 49 Mo., 441; and *Crispin vs. Hannivan*, 50 Mo., 536, where Judge Bliss seemed to intimate that there could be no color of title except by deed or some other instrument of writing. The judgments of the court were right in those cases, but the learned Judge indulged in some language of the import referred to, which must be restricted to the cases before him, and as not having a general application. He certainly did not mean to have it understood that in all cases a writing was ne-

 Lenox, et al. v. Clarke.

cessary to create color of title. The cases before him did not require him to pass upon that point, and I am therefore persuaded that he did not mean to be so understood.

Let the judgment be affirmed. The other Judges concur.

—o—

WILLIAM H. LENOX, *et al.*, Appellant, *vs.* GEORGE W. CLARKE,
Respondent.

1. *Sheriff's sales, Validity of—Purchaser under.*—A purchaser at a sheriff's sale looks only to the judgment, execution, levy, and sheriff's deed. All other questions are between the parties to the judgment and the sheriff.
2. *Sheriff's sales, validity of—Erroneous judgment—Collateral proceedings.*—Where a sheriff sells land under a judgment, erroneous in the fact that it was a joint judgment whereas only one defendant was served, such judgment is not void as to the defendant served, and can only be set aside as to him by direct proceedings for that purpose, and cannot be attacked in a collateral proceeding.

Appeal from St. Louis Circuit Court.

A. J. P. Garesche, for Appellant.

The officer only read the writ to H. Lenox, and yet the defendant was entitled to a copy of the petition and of the writ. This service was defective. (Hickman vs. Barnes, 1 Mo., 156; Spencer vs. Medder, 5 Mo., 461; Stewart vs. Stringer, 41 Mo., 400; Blanton vs. Jamison, 3 Mo., 52; Smith's adm'r vs. Rollins, 25 Mo., 410.)

Strict compliance with the law is required. (Matthews vs. Blossom, 15 Maine, 401; Sheldon vs. Comstock, 3 R. I., 84; Dobbins vs. Thompson, 4 Mo., 118; Waddingham vs. City of St. Louis, 14 Mo., 190; Cabeen vs. Douglas, 1 Mo., 336; Sanders vs. Rains, 10 Mo., 770; Cox vs. Matthews, 17 Ind., 377.) If the service is not a legal service it is no service and the judgment is void.

Truaten Polk, for Respondents.

A title acquired by sheriff's sale upon an execution issued upon a judgment which is *erroneous* is good, and even al-

Lenox, et al. v. Clarke.

though the judgment may be afterwards reversed. (Coleman vs. McNulty, 16 Mo., 173; McNair vs. Biddle, 8 Mo., 264; Jackson vs. Cadwell, 1 Cow., 644; Wilkinson's appeal, 65 Pa., 189, Law Jour. for Aug. 1871, p. 538; Gott vs. Powell, 41 Mo., 416, and authorities cited; Higgins vs. Peltzer, 49 Mo., 152.)

F. W. Lenox not being served, that part of the record reciting a judgment against him is mere surplusage, and cannot vitiate the judgment against Hamilton Lenox. (Higgins vs. Peltzer, 49 Mo., 152.)

A judgment which is erroneous cannot be brought in question collaterally. (Perryman vs. State to use, &c., 8 Mo., 208; Reeves vs. Reeves, 33 Mo., 28; Cabell, *et al.*, vs. Grubbs, *et al.*, 48 Mo., 353; Landes vs. Perkins, 12 Mo., 239, 260; Crowley vs. Wallace, 12 Mo., 143; Wilson vs. Jackson, 10 Mo., 330, 337, 382; Callahan, Pub. Adm'r, vs. Griswold, 9 Mo., 785; Farley vs. Montgomery, 5 Mo., 233; Voorhes vs. Bank of U. S., 10 Pet., 473-4-5; Hawley vs. Mancuis, 7 John., Ch. 174; Homer vs. Fish, 1 Pick., 435; Wilkinson's Appeal, 65 Pa. 189, Law Journal for Aug. 1871, p. 538.)

ADAMS, Judge, delivered the opinion of the court.

This was ejectment for a lot of land in the City of St. Louis.

Both parties claim through Hamilton Lenox, deceased, the plaintiffs as his heirs at law, and the defendant under a sheriff's deed. The only point raised here, is upon the validity of the sheriff's deed. It was made in virtue of two executions, one of which was issued in an attachment case in which this land was not attached, and there was no personal judgment, the other was on an execution issued on a judgment rendered in the Phelps County Circuit Court in favor of Elisha Q. Harding against Hamilton Lenox and F. M. Lenox.

The defendant abandoned the attachment judgment, and relied on the judgment and execution in favor of Harding.

The service of the summons in that case, as appears from the sheriff's return was as follows: "Served the within named H. Lenox a true copy of the within petition and reading this writ in Phelps County, Missouri, this April 12, A. D., 1861. T. F. Jones, Sheriff."

There is no return at all as to the other defendant F. M. Lenox.

The suit was upon a note, and the court rendered a judgment by default against both defendants for the amount of the note; and it was upon an execution issued on this judgment that the land in dispute was levied upon and sold.

This judgment was rendered under the practice act of 1855. The 7th Section of Article five of that act, (Sec. 2 Revised Code 1855, page 1223) specifies several modes of executing a summons. One is by reading the writ to the defendant and by delivering him a copy of the petition; this mode was pursued by the sheriff in that case, and the return substantially shows that this mode was complied with. The same section provides that where there are several defendants, a copy of the petition and writ shall be delivered to the first one summoned, and to those subsequently summoned a copy of the writ. The last provision was evidently intended to facilitate the manner of service. It was not intended thereby to prevent a service on each defendant in the manner pointed out in the first clause. Where there were several defendants, if each was served with a copy of the petition and by reading the writ, that would be a literal compliance with the first clause of the section, and what would be good as to a single defendant ought to be good as to each of several defendants.

The service therefore of the summons was sufficient to render a valid judgment against Hamilton Lenox. But there was no service at all on F. M. Lenox, and the judgment as to him was absolutely void. It was not a nullity, however, as to Hamilton Lenox; but being a joint judgment, it was erroneous and not void, as to Hamilton Lenox. In a collateral proceeding like this, errors of this sort cannot be inquired into, until set aside by a direct proceeding. Such a judgment must stand as valid against the party notified.

A purchaser at sheriff's sale looks to the judgment, execution, levy and sheriff's deed. All other questions are between the parties to the judgment and the sheriff. As the judgment in this case was valid and only erroneous, the execution

Tower, v. Moore,

issued thereon, and the levy and sheriff's deed being good, passed the title from Hamilton Lenox, the defendant in the execution.

Under this view, the judgment of the Circuit Court must be affirmed. The other Judges concur.

—o—

GEORGE F. TOWER, Defendant in Error, *vs.* BENJAMIN R. MOORE, Plaintiff in Error.

1. *Practice, civil—Exceptions, bill of—Objections saved.*—This court will regard no errors, except those patent of record, unless saved by bill of exceptions.
2. *Practice, civil—Trial—Jury, waiver of.*—Where defendant objected to going into the case, and took no further action in the case except to watch its progress and the clerk's entry was, "neither party requiring a jury the cause is submitted to the court," *Held*, that this was a sufficient waiver of trial by jury.
3. *Practice, civil—Parties—Appearance of—Trial.*—A party must either appear at a trial and abide the consequences or not appear. He cannot occupy an ambiguous position, partly appearing and partly not appearing.

Error to Butler Circuit Court.

Kitchen and McGinnis, for Plaintiff in Error.

I. A jury trial was wrongfully dispensed with by court. (Brown *vs.* H. & St. J. R. R. Co., 37 Mo., 299; Vaughn *vs.* Scade, 30 Mo., 604; 2 Abb. U. S. Prac., 140; Gen. Stat., ch 1. 69, § 14, p. 674; Scott *vs.* Russell, 39 Mo., 407.)

Lee and Adams, for Defendant in Error.

The record discloses that the parties either waived a jury trial in open court by appearing and "not demanding a jury and submitting said cause to the court," or waived the jury trial by not appearing at the trial.

SHERWOOD, Judge, delivered the opinion of the court.

Action in the Bulter Circuit Court by George F. Tower against Benj. R. Moore founded on a promissory note alleged in the petition to have been executed by defendant to one Story, assigned by the latter to Douglass and by Douglass to plaintiff.

The answer admitted the execution of the note and its transfer to Douglass, but pleaded payment thereof while in the hands of Douglass, and denied the transfer of the instrument to plaintiff.

A trial was had before the court, resulting in a judgment in favor of plaintiff. After moving unsuccessfully for a new trial and in arrest, this case is brought here by writ of error. The grounds urged for a reversal of the judgment are :

1. That the court improperly overruled defendant's application for a continuance.

2. That the court erred in dispensing with a trial by jury.

The first ground will not be noticed as the application is not incorporated in the bill of exceptions.

It is indeed passing strange that case after case is brought up here for review, upon matters of exception purely, with nothing saved upon which this court can act, when again and again it has been held that no errors (except those patent of record) would be regarded unless preserved by the Bill of Exceptions.

As to the second ground on which a reversal is sought, it may be observed that no objection was taken as to the mode of trial, but the complaint is that any trial at all was had, for it is set forth in the Bill of Exceptions that the defendant "objected to going on with the case * * * * *" and neither defendant nor his counsel nor any one of them at any time consented to go to trial, or waived their trial by jury either in writing or orally, nor did they demand a jury trial or take any other part in the trial, other than to appear and watch the conduct of the trial in the same manner counsel would participate in trials where the only evidence which appeared, was a note and testimony of assignment. Defendant's counsel participated in the trial to the extent of objecting to it, although they did not demand a jury or object simply on the ground that it was being tried by the court.

There are by statutory designation three cases in which a trial by jury is deemed to be waived :

"First, by failing to appear at the trial, second, by written

consent in person or by attorney filed with the clerk. Third by oral consent in court entered on the minutes."

The judgment in this case however, recites the fact of the appearance of the defendant and that "neither party requiring a jury, the cause is submitted to the court."

This recital of itself is a sufficient entry of consent within the purview of the statute.

In Vaughan vs. Scade, 30 Mo., 600 and Brown vs. H & St. Jo. R. R. Co., 38 Mo., 298, there was no waiver apparent by record of the right under discussion.

But even if the judgment did not contain a recital of the waiver referred to, the Bill of Exceptions fails to disclose any erroneous action on the part of the court below.

The defendant, as that bill shows, "Objected to going on with the case, did not consent to go to trial and did not participate therein, except to the extent of objecting thereto."

The court might well under such a state of facts presume an abandonment of the case on the part of the defendant. The bare matter of remaining in the court-house and watching, made no sort of difference. By his conduct, defendant had, so far as a jury trial was concerned, practically severed his connection with the case, and to all intents and purposes might as well have been a thousand miles away.

The *status* of a party in a court must be defined; he ought either to appear and go to trial, and accept its incidents and consequences, or else quit the field altogether; he will not be permitted to occupy in this regard an ambiguous attitude, nor by the way attempted by this defendant, to appear or disappear or re-appear, whenever he thinks it advantageous to do so. Such feats of *legerdemain*, such thimble-rig performances better befit another arena, and are not to be tolerated in a court of justice.

Let the judgment be affirmed. The other Judges concur.

Louthan, v. Caldwell,

WALKER G. LOUTHAN, Respondent, *vs.* L. G. CALDWELL, Appellant.

1. *Practice, civil, pleading—Answer—Demurrer—Judgment by default.*—It is irregular to enter judgment by default after answer and demurrer to the answer.

Appeal from Marion Circuit Court.

McCabe, for Appellant.

Dryden & Dryden, for Respondent.

The appellant waived and released the errors complained of, if any, and expressly assented to the judgment in the cause by appearing in said court and moving for a reduction in the amount of the judgment.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a promissory note.

The defendants by an amended answer attempted to set up usury, but from the answer the usury appears to have been paid.

There was a demurrer to this answer because it did not state facts sufficient to constitute a defense. This demurrer was sustained but no final judgment was rendered on the demurrer. The entry was that the demurrer be sustained. After this entry and during the same term a judgment by default was rendered and made final, and the defendants then filed a motion to set aside what they called a judgment on the demurrer which motion was overruled but no exceptions were saved. Afterwards the defendant filed a motion to correct the judgment as rendered, alleging that there were credits that had not been allowed, and that the judgment as rendered was for too large an amount. This motion was sustained and the judgment was accordingly corrected as desired by the defendants.

The defendants then made affidavit for appeal and filed bond for same and the appeal was granted.

I do not see why this appeal is here, there seems to be no error that we can pass upon. It was irregular to enter judgment by default after answer and demurrer to the answer.

City of St. Louis, v. Sickles', Executrix.

But this point is not saved so as to be passed on here. Besides the defendants on their own motion had the judgment corrected so as to represent the proper amount, which they considered they owed.

The action of the Court in rectifying the judgment on the defendant's own motion released the error, if any, in the prior judgment.

Let the judgment be affirmed. The other Judges concur.

—o—

CITY OF ST. LOUIS, Appellant, *vs.* SUSAN E. SICKLES, Executrix
of JAMES B. SICKLES, *et al.*, Respondent.

1. *Bonds, official—Sureties liability of—Implication.*—The engagement of a surety on an official bond is entered into with reference to the law which defines the duty of the officer, and cannot be extended by implication.

Appeal from St. Louis Circuit Court.

E. P. McCarty, for Appellant.

The recognition and implied authorization of the practice of delivering money to the auditor by the ordinances in force at the time of the execution of this bond, make the receipt of this money his official act and his direct violation of the express provision of ordinance as to its disposition, a breach of the bond.

This was the actual mode of conducting these accounts, established by the auditor and the departments, long before the time this bond was entered into.

Krum and Patrick, for Respondent.

It was not the auditor's duty to receive or disburse the public moneys, and the sureties could not have supposed that the auditor for whom they had become bound simply for the faithful discharge of his duties as auditor, would become the custodian of the public moneys or the disbursing officer of the city.

The obligations of the sureties to this bond, cannot be enlarged by implication.

City of St. Louis, v. Sickles, Executrix.

M. L. Gray, for Respondent.

The obligation of a surety is not to be extended by implication beyond the terms of his contract. (*Blair vs. Perpetual Ins. Co.*, 10 Mo., 566 ; *Nolley et al.*, vs. *Callaway Co. Court*, 11 Mo. 47.)

EWING, Judge, delivered the opinion of the court.

This is an action on the bond of Philip H. Murphy as auditor of the City of St. Louis, against the defendants as his sureties. The condition of the bond is as follows, namely: Now if the said Philip H. Murphy shall faithfully perform all the acts and duties required of him in said office by any law of the State of Missouri or ordinance of the City of St. Louis, now existing or hereafter passed, this obligation to be void; otherwise to remain in force. The bond bears date April 5th, 1867. The breach alleged is, that by an ordinance of the said City of St. Louis passed on the 6th day of September, 1864, the auditor is required at the end of each month to pay over to the treasurer of said city, all monies that may remain unpaid on any *pay roll* appertaining to his office, and that during the years 1868 and 1869 and whilst the said Murphy continued to be such auditor, he the said Murphy, in the discharge of his duties as such auditor, drew from time to time from the treasury of the plaintiff divers large sums of money on the payrolls appertaining to his office, to be paid out during the respective months in which they were so drawn to the persons respectively entitled thereto, and if not so paid the same were, at the end of the months in which they were drawn, to be paid over to the City Treasury according to the ordinance aforesaid; and plaintiff says that of the sums so drawn by said Murphy from said treasury, he during said period drew the sum—in the aggregate—of \$3,075 30-100, which he failed and refused to pay over to the persons thereto entitled, and which he also failed and refused to pay over to said treasurer at the end of the month in which it was received or at any other time, and which said sum the said Murphy failed and refused to pay at anytime to plaintiff or to its said treasurer, and the said

Murphy failed and refused, and still does so, to account for or pay over the sum aforesaid, but has appropriated the same to his own use contrary to the said ordinance and to his duties as such auditor.

The suit was dismissed as to Murphy after he filed his answer. The other defendants, Sickles and Cafferata filed separate answers, which however are the same in substance. These answers deny that there was any breach of the bond as alleged, and for further answer and defense to the action, state that under the laws and ordinances the said auditor was an accounting officer of said city and nothing more, it being his duty to audit and allow accounts and claims against said city and certify the same to the treasurer of said city, and that it was no part of his official duty under said laws and ordinances at the time he executed his said bond or at any time since, to receive or pay out money belonging to said city, and that they became the sureties of said Murphy with this understanding of his duties as such auditor. That if said auditor was permitted to draw money from the treasury as alleged, it was by reason of the misconduct of plaintiff, and they ought not to be held responsible therefor.

The evidence tended to prove that warrants had been issued and paid by the treasurer at the end of the various months; that it was the practice of the auditor's office during the time Murphy held it for the auditor to receive the money from the treasurer on warrants for the pay rolls, and pay the same to the various city officers, and that he failed to pay said moneys to the parties entitled to receive the same on said rolls for the years 1868 and 1869, but converted the same to his own use, and that he failed to pay any of said sums of money to the City Treasurer at the end of the respective months in which he received the same or at any time before or after.

These warrants were drawn by the auditor, countersigned by the comptroller and made payable "to pay roll or order." It further appeared in evidence that after said Murphy went out of office the practice was changed and warrants were drawn directly in favor of the parties named in the pay roll, and the money paid to them.

The plaintiff asked the following instruction: If the defendant, Murphy, as auditor, drew money on the pay-rolls offered in evidence from the City Treasury to be paid on those pay-rolls, and failed to pay a part of the moneys so drawn to the parties thereto entitled, and contrary to an ordinance duly passed and then in force, failed to pay over to the City Treasurer, the moneys that remained unpaid on the said pay-roll at the end of each month or afterwards; then the defendant Murphy, and his sureties on the bond in force when the moneys were so received and so omitted to be paid are liable for the same.

This instruction was refused, to which ruling of the court plaintiff excepted.

At the instance of the defendants, the court declared the law to be. That the sureties of the Auditor cannot be held for any deficit or default in regard to moneys of the city in the auditor's hands, unless it appears affirmatively that such moneys came to the auditor's possession in his official capacity and under some law of the State, or some ordinance of the city. These facts not appearing, there is no liability on the sureties shown.

There was a finding and judgment for defendants. A motion for a new trial being overruled, plaintiff brings the cause to this court by appeal.

The City Charter provides for an auditor and comptroller, who in addition to the duties prescribed by the act shall perform such other duties as may be prescribed by ordinance, Acts 1867, Art. 6, Sec. 10, p.—. By section 3 of the same article, it is made the duty of the City Auditor to prescribe the mode of keeping, stating and rendering all accounts, unless otherwise provided for by ordinance, between the city and any person or body corporate. The following section, 14, makes it the duty of the City Treasurer to receive and keep the money of the City and to pay out the same on warrants drawn by the Comptroller and audited by the City Auditor.

An ordinance of the City—5453, Rev. Ord. 1866, p. 559, made it the duty of the Treasurer to receive and keep all

moneys of the City which might come to his hands, and disburse the same upon the warrant of the Auditor legally drawn. It is not claimed by counsel for the City that there is any provision of the charter, or of any ordinance that expressly authorizes the auditor to receive or have the custody of the public moneys, but that such authority is implied or recognized from certain ordinances to which he refers, and which are substantially as follows, namely: That the auditor is required at the end of each month to pay over to the treasurer and take his receipt therefor all moneys that may remain unpaid on any pay-roll appertaining in any way to his office. That the Treasurer shall keep a pay-roll account which shall show proper dates, persons, objects and amounts, and he shall credit said account with all moneys paid over by the auditor as provided for in section sixteen, and shall on demand pay such persons as may appear entitled thereto the proper sums, and take their receipt for the same and charge the amount to said pay-roll account. (Rev. Ord. 1866, §§ 16, 17, p. 556.) It is provided by another ordinance, that in case the Mayor shall fail or refuse to nominate as therein before required, then the auditor is instructed not to pay the officer holding over after the Common Council shall have adjourned *sine die*, his salary. (Rev. Ord. 1866, § 8, p. 306.) The breach of the bond alleged is that in the discharge of his duties as such auditor, he drew from the Treasury from time to time, large sums of money on the pay-rolls appertaining to his office to be paid out to the persons respectively entitled thereto, and if not so paid, the same were at the end of each month to be paid over to the City Treasury, and that he failed to pay the same into the Treasury. The condition of the bond is that he shall faithfully perform all the acts and duties required of him as said officer by any law of the State or ordinance of the city, etc.

The contract of the sureties is only for the faithful performance of those trusts that properly and legally belong to his office. (Blair vs. Perpetual Ins. Co., 10 Mo., 560.) The sureties of a public officer whose duties are defined by law, are

only responsible for the faithful performance of the duties assigned to him by law and cannot be made liable for malversation in the conduct of affairs which do not pertain to his office, and if the officer engage or those who by law have the control of his official conduct employ him in matters foreign to his office, the sureties will not be bound for his acts while so employed; and any losses which may happen in the transaction or management of such business cannot be visited upon those who have guaranteed the official conduct of the officer. (Nolley vs. Callaway Co., 11 Mo., 447.) The obligation of a surety is not to be extended by implication beyond the terms of his contract; and the engagement is entered into with reference to the law which defines the duties of the officer; and it would be a palpable violation of his contract to hold him liable for the performance of other duties than those assigned to him by law. Was the money in question drawn from the Treasury by the auditor in official capacity, or in the discharge of his official duties? If not, there was no breach of his bond, and if after he received such moneys, he appropriated them to his own use, or otherwise failed to account for them, the sureties cannot be held reponsible for they were received without authority of law or ordinance. I am unable to find in any provision of the charter, or in any ordinance of the city, authority for committing the public moneys to the hands of the auditor. The duties of the Treasurer are clearly defined, he is the sole custodian of the public moneys. It is his duty in the language of the ordinance to receive and keep all moneys of the city which shall come to his hands and disburse the same upon the warrant of the auditor legally drawn. He had no more authority to pay the money due on the pay-roll to the auditor than to any other person who had no interest in it. No law or ordinance constituted the auditor the agent of the persons named in the pay-roll to receive and disburse the moneys. If he received the money due those persons it was by an unauthorized act of the Treasurer, and not in his official capacity, and it was therefore no breach of the obligation entered into by defendants as his sureties. The

 Chandler, Admr. v. Dodson et al.

pay-roll account was not payable to the auditor. He could legally have no official connection with it except to issue warrants in favor of the persons entitled to the money. If in accordance with an illegal and improper practice which it is claimed had existed, but of which it is not pretended the sureties had any knowledge, the auditor was made a disbursing officer of the moneys due on the pay-roll, it was clearly outside the scope of his official duties, and for a failure on his part to pay over moneys to the Treasurer received under such circumstances or otherwise to account for them, the surety cannot be held responsible. The obvious answer to such a demand is *non hæc foedera veni*.

The judgment is affirmed. The other Judges concur.

—o—

GUY CHANDLER, Admr. of BENJAMIN MURPHY, Plaintiff in Error, vs. JNO. DODSON, *et al.*, Defendant in Error.

1. *Administration—Probate Court, exclusive jurisdiction of—Circuit Court—Bill of Interpleader.*—The Probate Court has exclusive original jurisdiction in directing the appropriation of the proceeds, of an estate by an administrator, and a bill of interpleader by an administrator in the Circuit Court to determine the claims of different parties on such funds cannot be sustained.

Error to Adair Circuit Court.

De France and Halliburton, for Plaintiff in Error.

The plaintiff, as a trustee having reasonable doubt as to the proper disposition of said funds, has a right for his own safety to apply to a court of equity for directions. (*Hayden's Executors vs. Marmaduke*, 19 Mo., 403, and cases cited.)

Barron and Millan & Griggs, for Defendant in Error.

The order of the Probate Court when made had the force and effect of a judgment, and protects the administrator unless reversed or modified by a proper court under proper proceedings.

Chandler, Admr. v. Dodson et al.

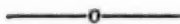
EWING, Judge, delivered the opinion of the court.

This was a proceeding in the nature of a bill of interpleader, instituted by the plaintiff as public administrator, in charge of the estate of Benjamin Murphy, the object of which is to have a decree of the court directing the application of certain funds to which there are conflicting claims. The petition alleges in substance that defendant, Nancy Murphy, was appointed administratrix of the estate of Benjamin Murphy, and that while she was so acting as administratrix, sundry claims which are specifically mentioned, were presented and allowed against said estate; and that while she was so acting, the Probate Court made an order appropriating out of the assets belonging to said estate, the sum of seven hundred and twenty dollars for the support of said Nancy—as the widow of said deceased—and the heirs of said deceased, and that subsequently there was a further order of said court appropriating fifty dollars for the education of the minor heirs. It is further alleged that certain of the claims allowed as aforesaid, have been paid and that certain others remain unpaid; that said Nancy made a final settlement of the administration of said estate and resigned. That another was appointed administrator, *de bonis non* of said estate, and while acting as such, paid the said Nancy on the allowance aforesaid, \$412.30, proceeds of the sale of real estate of said estate, and made a final settlement with said court, and resigned his letters of administration. That thereupon plaintiff was ordered as public administrator to take charge of said estate, which he did, and as such sold under order of the court certain real estate for \$300, and by an order of said court, paid said Nancy Murphy, widow, out of said proceeds, \$127.50 as her dower interest in rents collected on property of the estate; that the balance remains in plaintiff's hands which is claimed by said widow and the defendants as creditors of the estate; that said funds are held in trust for said widow or said creditors, and he has doubts as to the proper application of the fund, wherefore plaintiff prays for a decree directing how it shall be paid.

A demurrer to the petition was sustained, upon which judgment was entered, and the cause is here by writ of error.

The demurrer to the petition was properly sustained. The Probate Court, as it had the exclusive power to do, made an appropriation out of the assets of the estate for the benefit of the widow, the greater part of which has been paid to her under orders of the court. The administration upon the estate is still open and unsettled, and the Probate Court is competent to hear and determine the controversy respecting the duties of the administrator in relation to the fund to which the widow and creditors make claim. That court has exclusive original jurisdiction of the subject. The jurisdiction in such case is as clear as it is to hear and determine any demand against an estate. (See *Miller vs. Woodward*, 8 Mo., 168; *Overton vs. McFarland*, 15 Mo., 312.) And any orders it may make in the premises will therefore afford protection to the plaintiff, as administratrix in obeying them. This is the only object the plaintiff seeks to accomplish by the proceeding.

Judgment affirmed. The other Judges concur.



JOSEPH DILWORTH, Defendant in Error, *vs.* ALEXANDER FEE,
et al., Plaintiff in Error.

1. *Practice, civil—Forcible entry and detainer—Title.*—In an action of forcible entry and detainer the title to the land is not involved, but a forcible entry with or without title is forbidden.

Error to St. Louis Circuit Court.

R. S. Voorhies, for Plaintiffs in Error.

1. The turning out of Anapias Rice under the writ of possession against him alone, did not affect the rights of Robert P. Rice, whose tenant Anapias Rice was, in the premises.

2. Robert P. Rice had had more than three years uninterrupted constructive possession, claiming as owner under deed ;

and the right was with him to enter peaceably as against the constructive possession of a stranger.

3. The possession if any had, as against Robert P. Rice, was constructive; there was no occupation by the plaintiff, without which he could not have adverse possession.

4. Under the manner of the plaintiff's entry and departure from the premises he acquired neither actual or constructive possession against Robert P. Rice.

5. The plaintiff being in the character of a trespasser, as to Robert P. Rice, could not by the mere act of closing and locking up the house acquire a constructive possession, much less any possession which he could enforce against Rice by action of Forcible Entry and Detainer. (*Garrison vs. Savignac*, 25 Mo., 47.)

The mere act of nailing of the doors of a house, does not amount to attaining possession. (*Hopkins vs. Buck*, 3 A. K., Marsh, 110.) In the absence of the occupant, the owner having the right to the possession may enter by forcing open the door, though the occupant expects to return. (*Mussey vs. Scott*, 32 Vt., 82; *Turner vs. Meymott*, 1 Bing., 158.)

A person having a right may make a peaceable entry.— (*Krevet vs. Meyer*, 24 Mo., 111.)

Dryden & Dryden, for Defendant in Error.

A defendant in forcible entry and detainer cannot justify his forcible entry by showing that he had the right to the possession. (*Harris vs. Turner & Houck*, 46 Mo., 438; *King's admr's vs. St. Louis Gas Light Co.*, 34 Mo., 34; *Beeler vs. Cardwell*, 29 Mo., 72; *Spalding vs. Mayhall*, 27 Mo., 377; *Stone vs. Malot*, 7 Mo., 158.)

EWING, Judge, delivered the opinion of the court.

This is an action of forcible entry and detainer brought before a Justice of the Peace, and removed by certiorari to the Circuit Court. Plaintiff proved on the trial that he was put in possession of the premises under a writ of restitution issued upon a judgment of the Circuit Court of St. Louis county rendered against A. P. Rice, at the June term, 1866, which

was executed May 3d, 1871. That when said Rice was put out by the sheriff he put two persons in possession who had been sent there to receive possession for the plaintiff; that they remained a short time, but before leaving locked and fastened the doors and nailed boards across the windows. In a few days thereafter the defendant Fee was found in possession of the premises. He admitted that he and his co-defendant Rice had broken open the door and had gained an entrance into the house by forcing the lock, hasp and staples off the door.

The defendant offered in evidence the record and judgment in the case of Dilworth vs. Rice, under which Anapias Rice was ejected, also a deed from Marshall, Adm'r of Well, to R. P. Rice dated in 1858; also the record and judgment in the case of Charles Richardson vs. Anapias Rice and Robert P. Rice in the St. Louis Land Court, it being an action of ejectment in which judgment was rendered for the defendant, A. Rice, the suit having been dismissed as to R. P. Rice. (It was admitted for the purpose of this case that in the last mentioned suit, R. P. Rice was not found, or served with process.) All this evidence was objected to by the plaintiff and excluded by the court.

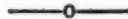
The court instructed the jury, substantially, that if the defendants entered upon the premises in dispute with force or strong hand, or by breaking open a door of a house on said premises, and detained and held the same and continued to detain and hold the same up to and at the time of the institution of the suit, and that at the time of said entry the plaintiff was by his agents or servants in possession of said premises, they should find for the plaintiff, &c.

The jury were also properly instructed in regard to what constituted possession. The defendant asked several instructions based upon the theory of a *constructive* possession in Robert P. Rice, which it was claimed was not affected by the judgment against his tenant A. Rice, because he was not served with process, and because of the failure of his tenant to notify him of the pendency of the suit, and that therefore his entry into the possession was lawful.

City of St. Louis, to use, etc, v. Clemens.

Nothing is more firmly settled by repeated decisions of this court than in actions of this kind, there can be no inquiry into the title to the property involved, that the law forbids a forcible entry with or without title, and that it is immaterial whether the intruder is a mere trespasser or enters under a paramount title, for if he has the right to the possession he must resort to the authority of the law to obtain it. (*Stone vs. Malot*, 7 Mo., 158; *Warren vs. Ritter*, 11 Mo., 354; *Spalding vs. Mayhall*, 27 Mo., 377; *Beeler vs. Cardwell*, 29 Mo., 72; *King's Adm'r vs. St. Louis Gas Light Co.*, 34 Mo., 34; *Harris vs. Turner*, 46 Mo., 438.) The evidence relating to the title was therefore properly excluded. The objection to a question asked one of the witnesses, Richardson, and his answer thereto, is not well taken. The *form* of the question may not have been technically correct, but the fact elicited by the answer was pertinent and material. The object of the question was to ascertain for whom, and by what authority he locked up the house; and the answer given states the reason why he locked it, namely, to hold the possession for the plaintiff. His authority to do this is abundantly shown in other parts of his testimony which were not objected to, and by that of other witnesses.

Judgment affirmed. The other Judges concur.



CITY OF ST. LOUIS, to use of JAMES CREAMER, Respondent, *vs.*
JAMES CLEMENS, Appellant.

1. *Authority delegated—St. Louis, City of—Charter—Ordinances.*—The charter of the City of St. Louis authorized the construction of sewers in said city, the dimensions to be determined by ordinance of the City Council; *Held*, that an ordinance leaving the determination of the dimensions to the City Engineer would create no liability on the part of the property-owners to pay for the work done. [*City of St. Louis, to use of Murphy vs. Clemens*, 43 Mo., 395, and *Sheehan vs. Gleeson*, 46 Mo., 100, affirmed.]

City of St. Louis, to use, etc, v. Clemens.

2. *Laws retrospective—Constitution of Missouri.*—Certain sewers were built in the City of St. Louis under invalid ordinances, creating no liability on the part of property owners, and afterwards the legislature passed an act authorizing the city to re-assess the sum remaining unpaid on the real estate benefited by the improvement; *Held*, that the act of the legislature was retrospective and void under the State Constitution. (Art. 1 § 28.)

Glover, Shepley and Gardner, for Appellant.

I. The ordinance of the City of St. Louis, No. 6001, is invalid in that it did not give the position, extent or direction of the sewer intended to be established.

II. The ordinance is invalid because it did not prescribe the dimensions of the sewer intended to be constructed. (City of St. Louis, to the use of *Murphy vs. Clemens*, 43 Mo., 395.)

III. The ordinance was invalid and the original assessment for the purpose of meeting the expenses thereby caused is invalid. And therefore the act of the General Assembly passed in 1870, is retrospective and void.

This is no tax, but it is an assessment upon adjoining property for the construction of public works benefiting the particular property. (*Lockwood vs. City of St. Louis*, 24 Mo., 20; 11 Johns., 77; *Sheehan vs. The Good Samaritan Hospital*, 50 Mo., 155.)

There was no lien or any obligation upon the plaintiff or his property for the cost of this sewer at the time this act of March 21, 1870, was passed.

This law of 1870 does not give a municipal corporation a power to levy a tax, but gives a private individual a right which he did not possess, and takes away from the appellant a defense that was perfect before the act was passed.

This act is retrospective legislation and is prohibited by the Constitution. (Const., Art. 1, § 28; *Hope Mut. Ins. Co. vs. Flynn*, 38 Mo., 483.; *Sedgwick on Stat. and Co. Law*, 158.)

The cases from New York and Pennsylvania do not apply to this case because the constitutions of those States contain no prohibitions against retrospective laws.

Samuel Reber, for Respondent.

This is a tax, and taxes may be imposed before, at the time,

City of St. Louis, to use, etc, v. Clemens.

or after the debt or liability to be paid is created. And this is true of special or corporation taxes as well as of general taxes. (*Meech vs. City of Buffalo*, 29 N. Y., 198; *Wetmore vs. Campbell*, 2 Sandford, 341; *Charter City of St. Louis*, Sess. Acts 1867, p. 75.)

The question involved in this case has been decided in *Howell vs. the City of Buffalo*, 37 N. Y., 267-272; *Brewster vs. City of Syracuse*, 19 N. Y., 116; *Meech vs. City of Buffalo*, 29 N. Y., 198; *Town of Guilford vs. Supervisors of Chenango Co.*, 13 N. Y., 143; 2 Sandford, S. C., 341; *Dillon on Municipal Corporations*, Sec. 652; *Cooley on Con. Lim*, 209-496 *et seq.* 2d Ed., *Schenley vs. The Commonwealth, &c.*, 36 Penn. State, 29; *Hines vs. Leavenworth*, 3 Kansas, 186.

As to retrospective law, see *Cooley Con. Lim*, 2 Ed., p. 369 *et seq.* and cases cited; particularly, 6 *Yerger*, 125; 37 N. H., 304; 4 Texas, 474-5; 7 *Humphreys*, 130.

The following additional cases illustrate the nature of the taxing power, &c: *State, &c., vs. Linn County*, 44 Mo., 504; *State, &c., vs. Dulle*, 48 Mo., 282; *Steines vs. Franklin County*, 48 *Ibid*, 167; *North Mo. R. R. vs. Maguire*, 49 Mo., 490; *The City vs. Lamson*, 9 Wallace, 477; *Litchfield vs. Vernon*, 41 N. Y., 133-137; *People, ex rel. vs. Lawrence Ibid*, 137.

VORIES, Judge, delivered the opinion of the court.

This action was commenced in the St. Louis Circuit Court to enforce the collection of a special tax-bill assessed against the appellant's property for the construction of a district sewer in the City of St. Louis.

On the 24th day of January, 1867, the city council of the City of St. Louis passed an ordinance by which it is provided that a sewer district denominated "Green Street Sewer District" shall be established, and that the city engineer shall cause sewers to be constructed within said district, said sewers to be constructed with such material, and of such dimensions as the city engineer should deem to be requisite.

The ordinance also directed the manner in which the cost of

constructing sewers in said district should be assessed against the property in the vicinity, and collected from said property or the owner thereof.

The ordinance was passed under the act to revise the charter of the city which was passed by the legislature on the 19th day of March, 1866, by which it is provided that "the city council shall cause sewers to be constructed in said district whenever a majority of the property holders resident therein, shall petition therefor, or whenever the city council may deem such sewer necessary for sanitary or other purposes; and such sewer shall be of such dimensions as may be prescribed by ordinance and may be changed, enlarged or extended, and shall have all the necessary laterals, inlets and other appurtenances which may be required.

The City Engineer under the above named ordinance contracted with Jas. Creamer, for whose use this suit was brought, to do the work in constructing this sewer, for which the assessment was made against the property of appellant, and for which suit is brought. The contract under which the work was done, was entered into between the city and Creamer on the 30th day of March, 1867.

It is admitted that the work was completed under the contract, and an assessment made. A tax-bill issued for about the same amount and for the same work, under the law as it existed prior to the act of March 21st, 1870. The tax-bill sued on is for \$440 38-100, and is admitted to be in due form, and it is indorsed thereon that it was issued under the act of re-assessment, approved March 21st, 1870. It is admitted by the parties, as appears by the bill of exceptions, that the special tax-bill sued on was a re-assessment under the act of March 21st, 1870 printed on page 456 and following of laws of Missouri 1870 and that said act may be read as a part of the case without being copied into the Bill of Exceptions.

No question is made in this case as to either the pleadings or the evidence, but the questions presented to this court are purely questions of law.

The defendant, after the close of the evidence, moved the court to declare the law to be as follows:

1st. "The court declares the law to be that under the issues and evidence in the case, the plaintiff is not entitled to recover."

2d. "If the sewer in question was constructed and completed and an assessment made for the cost thereof under an ordinance, and statute or statutes existing prior to the passage of the act approved March 21st, 1870, referred to in plaintiff's petition, and under which the alleged re-assessment was made upon which plaintiff now seeks to recover in this action, and if said act imposes upon defendant any obligation, or liability for which he was not bound or liable, or created any new bar to any defense, the defendant might have had to the claim if sued upon before the passage of that act, then it is retrospective or retroactive, and defendant cannot be made liable under the same."

3d. "The City of St. Louis as a municipal corporation must act strictly within the power conferred by its charter, and if in establishing or constructing the sewer in question the said corporation, its agents or servants failed to conform to the provisions of its charter, or exceeded the powers conferred, then said defendant is not liable for the construction of said sewer, and the plaintiff cannot recover in this action."

4th. "If the act, referred to in plaintiff's petition, approved March 21st, 1870, under which the alleged re-assessment for the cost of the sewer in question was made, and upon which plaintiff now seeks to recover, imposes upon defendant any new obligation or liability, or creates any new bar to any defense the defendant might have had to the claim, if sued upon before the passage of that act, then it is retrospective or retroactive and defendant cannot be made liable under the same."

5th. "The power to establish sewer districts and to construct public sewers in the City of St. Louis is a trust delegated to the city as a municipal corporation, and which said corporation cannot delegate to other parties or persons. If therefore, ordinance No. 6001, purporting to be an ordinance to establish "Green Street Sewer District, No. 2" and to provide

City of St. Louis, to use etc, v. Clemens.

for the construction of sewers therein (under which the sewer in question was constructed,) failed to prescribe the dimensions of the sewers to be built in said district, but left the same to the discretion of the City Engineer, said ordinance was illegal and void, and plaintiff cannot recover of defendant for work done under the same."

These instructions or declarations of law were all refused, and no instructions given; to this action of the court, defendant excepted. The court then rendered judgment in favor of plaintiff against appellant for the amount of the tax-bill and interest, to be levied of the property assessed, &c.

After judgment was rendered appellant filed a motion for a new trial, and set out as causes, that the verdict is against the law; that it is against the evidence. That the court erred in refusing legal and proper instructions asked by the defendant; and because the verdict is against both law and the evidence, and should have been for the defendant.

The court overruled this motion and rendered a final judgment against the defendant, from which he appealed to the general term of the St. Louis Circuit Court, where the judgment rendered by the special term was affirmed, from which last judgment defendant appealed to this court.

This case comes here to be reviewed upon questions of law growing out of what are the admitted facts in the case. The only question for consideration, and upon which the decision in this court must turn, is as to whether the plaintiff can recover against the defendant by virtue of the act of the General Assembly of this State passed or approved March 21st, 1870, to authorize a re-assessment of the defendant's property for work done before the passage of the act and under a different law.

That the ordinance under which the work sued for was done, authorizing the construction of sewers "of such dimensions and of such materials, as may be deemed requisite by the City Engineer, "is not sufficient to justify the construction of the work, or to raise any obligation or responsibility on the part of the appellant to pay for the work done, this court has already decided in a case where the ordinance was identical

City of St. Louis, to use etc, v. Clemens.

with the one under which the work was done in the case under consideration. (City of St. Louis to the use of Murphy vs. Clemens, 43 Mo., 395, also Sheehan vs. Gleeson, 46 Mo., 100.) That question will therefore require no further consideration.

If the plaintiff can recover in this case it must recover by virtue of the provisions of the act of the 21st March, 1870. The preamble to that act explains its scope and objects it is as follows :

“Whereas the City Council of the City of St. Louis did ordain certain work to be done in macadamizing, curbing, guttering, paving, laying crosswalks in certain streets, paving and repairing sidewalks and construction of district sewers in the City of St. Louis, and said city did accordingly contract with divers persons to do said work, who were to receive special tax-bills therefor, to be collected from the property adjoining the streets where the work was done; and whereas said ordinances failed to specify the material, dimensions, and other particulars as to how the work was to be done, which however was fully specified in the contract and the work done according to such specifications; and in consequence thereof, many of the special tax-bills have not been collected, and said persons have in many instances been unable to collect payment for their work so done, now therefore be it enacted,” &c.

The first section of the act then provides that “The City Engineer of the City of St. Louis is hereby authorized and empowered, and it shall be his duty to re-assess as a special tax within said City of St. Louis against the real property fronting upon the work done or situate in the respective district, the cost of the work done in macadamizing, curbing, guttering, paving and laying of crosswalks in streets and alleys, paving and repairing sidewalks and construction of district sewers, according to the provisions of an act entitled “An act to revise the City Charter of the City of St. Louis” approved March 13th 1867 in regard to the assessment of such special tax in all such cases where such work was done in accordance with contract and under authority of ordinance, but where, by any defect in such ordinance, the special tax-bills issued for such work remain uncollected.

The second section of the act provides that the re-assessment shall be made under the provisions of the act to revise the City Charter passed March 13th 1867. By the fourth section it is further provided that, the "City Engineer shall make out a certified bill of such re-assessment against each lot of ground upon which such tax may be assessed, and upon which the same may not have been paid, in the name of the owner thereof; said certified bill shall be delivered to the contractor for the work, who shall proceed to collect the same by the ordinary process of law in his name, and in case of absent owner, he or they may sue by attachment or by any other process known to the law, and every such certified bill shall be a lien against the lot of ground, &c."

Now it is admitted in this case that the work for which this suit is brought was done under the ordinance of the City passed on the 24th day of January 1867; and that the contract for the work with Creamer was made on the 30th day of March 1867; and the work was done and the assessments made therefor long before the passage of the act of March 21st 1870; and that the tax-bills sued on are for a re-assessment made under the act of March 21st 1870, for the same work.

The question then is, whether this act of the 21st of March 1870, authorizing a re-assessment of the work so previously done, could or does cure the defect in the ordinance under which the contract was made and the work done, so as to invest a right in the contractor to recover, and a liability on the part of the appellant to pay for the work done, when neither such right or liability existed at the time the work was completed; or, in other words, is the act of the 21st of March 1870, to be considered a retrospective act (so far as it is attempted to be applied to this case) within the prohibition of the constitution of this State, and therefore void?

It is contended by the respondent that the re-assessment and tax-bills upon which this suit is brought and the act of the 21st of March 1870, are, when taken together, only a proper exercise of the taxing power vested in the Legislature of the State, that taxes may be imposed before, at the time of or af-

City of St. Louis, to use, etc, v. Clemens.

ter the creation of the debt or liability to be paid thereby, and that this is true as well in reference to corporation or special taxes as to general taxes to be levied by the State. We are referred to the cases of *Howell vs. The City of Buffalo*, 37 N. Y., 267, and *Schenly vs. Commonwealth, &c.*, 36 Penn. State R., 29 as well as other cases, to sustain the view of the law.

The first case named was brought to test the validity of an assessment made by the City of Buffalo upon the lands of the plaintiff and others, by virtue of an act of the Legislature to authorize the Common Council of the City of Buffalo to make re-assessment to defray the expenses of local improvements on a street in said City.

The City of Buffalo had power, under certain restrictions, to cause the streets to be paved, and to assess the expenses upon the lands to be benefited by the improvement in proportion to the benefit received. The City ordered a street to be improved, the improvement was made and the cost assessed on the adjoining property. The City after the work was done paid the Contractor the full amount for his work, a small portion of the amount having been received from parties whose property had been assessed. The balance was paid from the general fund of the City. An effort was made to collect the balance of the money which had been paid by the City from the parties whose property had been assessed therefor, upon which the order directing the improvement to be made was adjudged to be void for want of the City Assessor's certificate as required by law. The City then procured an act to be passed by the Legislature, by which it was enacted that the City Council, for the purpose of defraying the expenses of said improvements, were authorized to re-assess the sum remaining unpaid on the real estate benefited by the improvements. The City Council made the re-assessment and placed the roll of the re-assessment in the hands of the proper officer for collection. The suit was brought to enjoin the collection of the taxes so re-assessed, on the ground that said re-assessment was void. The ground relied on by the plaintiff in that case was, that to make the assessment valid the benefit must be conferred at

City of St. Louis, to use, etc, v. Clemens.

the time, and as a result and consequence of the making and collection of the assessments. That where that was not done, it violated the section of the Constitution which provides : "Nor shall private property be taken for public use without just compensation."

It was held in that case that the fact that the assessment was made after the improvement had been paid for by the City, and the owners of the property were enjoying the benefits, for the purpose of reimbursing the City, did not render the assessment unconstitutional ; that it did not violate the provision of the constitution which provides that private property shall not be taken for public use without just compensation. No question was made as to the law authorizing the reassessment being retrospective in its operation, and in fact there is no provision in the Constitution of New York prohibiting the passage of the retrospective law.

The case referred to in Pennsylvania presented this question : The City of Alleghany had passed an ordinance directing street improvements to be made, the improvements were made and an assessment made against the property benefited thereby ; the assessment if valid created a lien on the property assessed. After the assessment was made it was found that the ordinance under which the work was done had not been recorded as the law required, and was therefore void. The Legislature then passed an act validating said ordinance. One question in the case was as to the constitutionality of the validating act. It was held by the Court that the Legislature, provided it violated no constitutional prohibition, might pass retrospective laws giving a party a remedy that he did not previously possess or removing an impediment in the way of legal proceedings.

The Legislature of a State can undoubtedly authorize or direct the levying of taxes to pay a pre-existing debt. This is done under the general taxing power incident to all governments, and may be exercised by the Legislature except where it is restrained by the Constitution. The most of the cases relied on by the plaintiff in this case grow out of the exercise

City of St. Louis, to use, etc, v. Clemens.

of this general power of taxation for general purposes ; or they originate in States where there is no constitutional prohibition to the passage of retrospective laws.

The assessments under consideration, authorized by the act of March 21st, 1870, are, if it is true, attempted to be derived from the taxing power ; but they are not included in the general power of taxation for general purposes, and in fact could not be, for the constitution of this State requires all such taxes to be levied on property in proportion to its value.

It has been repeatedly held by this Court that the tax bills or assessments are not to be regarded in the light of general taxation, but are regarded as assessments for improvements and are not considered a burden which every person is placed under by virtue of being a member of the government and protected by its laws, but as an equivalent or compensation for the enhanced value which the property derives from the improvement. (Sheehan vs. The Good Samaritan Hospital, 50 Mo., 155, and cases there cited.) Hence the rules of law governing general taxation and the adjudication in reference thereto are not always applicable to cases growing out of these assessments.

But to return to the real question in this case : is the act of the 21st March 1870, under which the tax bill sued for in this case was and is assessed, a retrospective law coming within the prohibition contained in the Constitution of this State ?

It is said by Mr. Sedgwick after a thorough investigation of retrospective legislation, that " The result of this branch of our inquiry is, then, that the Legislature is competent to give a statute a retroactive or retrospective effect unless, first, the act violates the provision of the Federal Constitution in regard to *ex post facto* laws, and the obligation of contracts ; second, unless it so interfere with the vested rights of property as not to come within the proper limits of the law-making power ; or, third, unless it comes within the purview of some express prohibition contained in a State Constitution." (Sedgwick on Statutory and Constitutional Law, page 202.)

The 28th section of the 1st article of the Constitution of

this State is as follows: "That no *ex post facto* law or law impairing the obligation of contracts or retrospective in its operation can be passed." Here is a positive prohibition against the passage of any law which is retrospective in its operation. There is nothing left for construction, we have only to ascertain what is defined to be a retrospective law, and if the law under consideration comes within the definition, the Constitution pronounces the judgment.

Sedgwick defines a retrospective law thus "A Statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed, is to be deemed retrospective or retroactive." (Sedgwick Statutory Constitutional Laws, 188.)

Retrospective laws, even where they were not prohibited by a constitutional provision, were never favored, and it was this disfavor which induced the convention that framed the Constitution of this State to prohibit such legislation.

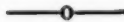
In the case of Hope Mutual Ins. Co., vs. Flynn, 38 Mo. R., 493, Judge Wagner who delivered the opinion of the Court, adopts and approves of the definition given by Sedgwick of a retrospective law, and says: "No new ground of support of an existing action ought to be created by legislative enactment, nor any legal bar which goes to deprive a party of his defense, &c." (See also Fowler vs. The City of St. Joseph, 37 Mo., 228.)

Now, taking the rule laid down by the above authorities for our guide, how can the law of the 21st of March, 1870, be upheld? The City of St. Louis, under the law as it stood when the contract was made and the work done for which the assessment was made for which this suit is brought, could only authorize the making of improvements of the kind in question so as to charge the adjoining property with the cost thereof, by a compliance with the requirements of her charter. This was not done in this case, so that the doing of the work by the contractor at the time created no obligation on the part of appellant to pay therefor, nor did it create any lien

on the property of the appellant to secure the payment of the cost of the work, nor did it create any right in favor of the Contractor to demand or recover the same from either the defendant or his property, either in the name of the City for his use or otherwise. If the Charter had been complied with, it is expressly provided that the City shall be in no way bound to pay for the work done, but the contractor looks to the adjoining property and his lien thereon for his pay. No such right or liability was created in the present case unless it is created for the first time by the act of 21st of March, 1870. How then can we say that this act does not create a new right in favor of the contractor and incur a new liability on the part of the defendant. In fact the act in its preamble professes on its face to be intended only to operate in a retrospective way, at least so far as the work for which this suit is brought is concerned. To my mind this law comes exactly within the definition to be given to a retrospective law. Whatever we may think of the hardship or misfortune involved in a particular case, where the law is clear we are bound to enforce it.

The instructions asked for by the defendant and refused by the St. Louis Circuit Court ought to have been given and judgment rendered for the defendant. The Court below having refused said instructions and rendered judgment for plaintiff, said judgment ought to be reversed.

The other judges concurring, the judgment of said Circuit Court at General Term, as well as the judgment at Special Term are hereby reversed.



LESLIE GARNET, Plaintiff in Error, vs. JNO. B. RODGERS, *et al.*,
Defendants in Error.

1. *Justices' Courts—Appeal bond—Default, motion to set aside.*—When a judgment by default before a Justice of the Peace is appealed from, but no motion is made to set aside the default, the appeal bond given in such case is void.

Garnet, v. Rodgers, et al.

*Error to St. Louis Circuit Court.**E. P. McCarty*, for Plaintiff in Error.

The recognizance is a record which the defendants have voluntarily made and they are estopped from disputing it. (People vs. Liggett, 5 Barb., 362; Gildersleeve vs. The People, 10 Barb., 40; Adair, *et al.*, vs. The State, 1 Blackf., 200; McCarty vs. The State, 1 Blackf., 338; People vs. Carpenter, 7 Cal., 402.)

The error complained of is really matter of exception and can only be reviewed here after an unsuccessful motion for a new trial in the Circuit Court. (State vs. Marshall, 36 Mo. 400; Bateson vs. Clark, 37 Mo., 31; State vs. Matson, 38 Mo. 489; Bishop vs. Ransom, 39 Mo., 416.)

E. B. Adams and H. H. Denison, for Defendants in Error.

The recognizance sued on, being for an appeal from the judgment of a Justice of the Peace by default against John B. Rogers, and there having been no motion made and overruled to set aside the default and grant a new trial, is void. (2 W. S., 847, §§ 2 and 3; Barnett vs. Lynch, 3 Mo., 369; Adams vs. Wilson, 10 Mo., 341; Cockrill vs. Owen, 10 Mo., 287; Nichols vs. Circuit Court, 1 Mo., 357; Commonwealth vs. Loveridge, 11 Mass., 337.)

VORIES, Judge, delivered the opinion of the court.

This action is brought in the St. Louis Circuit Court on an appeal bond or recognizance executed before a Justice of the Peace by defendant Rogers, as principal, and the other defendants as his sureties.

The petition charges that plaintiff, on the 24th day of March, 1871, obtained a judgment against defendant Rogers before one McAuliffe, a Justice of the Peace within and for St. Louis County, for \$150 65-100 in an action upon an account. That on the 2nd day of April, 1870, said Rogers appealed said case to the St. Louis Circuit Court, and thereupon with the other defendants entered into a recognizance before said Justice under their hands and seals, whereby said Rogers as principal,

Garnet, v. Rodgers, et al.

and the other defendants as sureties, acknowledged themselves indebted to plaintiff in the sum of three hundred and fifty dollars, upon the condition, as follows: "Whereas, John B. Rodgers has appealed from the judgment of Daniel McAniff Justice of the Peace, in an action between Leslie Garnet, & Co., plaintiffs, vs. John B. Rodgers defendant; now if on such appeal the judgment of the Justice be affirmed, or if on the trial anew in the St. Louis Circuit Court, judgment shall be given against the appellant and he shall satisfy such judgment, or if his appeal shall be dismissed and he shall pay the judgment of the Justice, together with the costs of the appeal, the recognizance shall be void." That said bond was approved by the Justice and is filed with the petition. That afterwards, on the 17th day of June, 1870, the said appeal of said defendant Rodgers, from the judgment of said Justice, was by the order and judgment of said Circuit Court dismissed; that said appellant Rodgers has failed and refused to pay said judgment of said Justice, or the costs of the appeal, or any part of the same, but said judgment still remains unpaid and in full force, whereby an action has accrued, &c. Judgment is prayed for the amount of the judgment set forth, and costs.

The defendants in their answer set up as a defense to said petition, that the judgment named in plaintiff's petition was a judgment rendered by the Justice against defendant Rodgers, by default, and that said Rodgers as principal, and the other defendants as his sureties, with a view and for the purpose of taking an appeal from said judgment to the St. Louis Court, subsequently executed said recognizance or bond, but that prior to entering into said recognizance and the taking of said supposed appeal no application was made to the Justice to set aside said judgment by default, nor was the same refused by said Justice.

That after the taking of the supposed appeal, the transcript &c., of said cause was filed in the said Circuit Court, and that after the filing of said papers in said court, said Garnett, the plaintiff in the judgment, moved the said Circuit Court to

dismiss said supposed appeal for the reason that no motion had ever been made before said Justice to set aside said judgment by default before said appeal was taken and said bond executed, and no such motion had ever been refused by said Justice; that upon a hearing of said motion so filed in said Circuit Court the said Circuit Court sustained the same and dismissed said supposed appeal.

The plaintiff demurred to this answer because it did not state facts constituting any defense to plaintiff's cause of action. The Circuit Court at special term sustained the demurrer, and defendants failing to further answer, judgment was rendered against them for the amount of the bond; execution being awarded for the amount of the judgment of the Justice, with costs, &c.

An appeal was then taken to the General Term of the St. Louis Circuit Court, where the judgment of the special term was reversed and the cause remanded. From this last judgment plaintiff appealed to this court.

The principal question to be considered here is as to the sufficiency of the defendant's answer filed in this suit to defeat the plaintiff's recovery: or, was the bond or recognizance executed by the defendants to procure an appeal from a judgment by default rendered by the Justice, where no motion had been made to set aside said default, and of course no such motion *refused* or overruled, binding on the defendants, or was it without authority of law, and therefore void?

The statute on the subject provides that, "No appeal shall be taken from a judgment by default or of non-suit, unless, within ten days after the rendition of such judgment, application shall have been made to the Justice by the party aggrieved to set the same aside, and such application shall have been refused."

It will be seen from this statute that the Justice has no authority to grant an appeal from a judgment by default, unless application to set said default aside has been made within ten days after the rendition of the judgment, and the same refused. Until this is done, no authority is given to grant the

appeal, or take the recognizance which forms a part thereof. It has been held by this court that an appeal taken without such application is void, and will give the Circuit Court to which the cause is attempted to be taken, no jurisdiction of the cause. (*Barnett vs. Ivers, et al.*, 3 Mo., 369, side page. The case of *Adams, et al., vs. Wilson*, 10 Mo., 341, was an action brought on three several recognizances taken on an appeal from the judgments of a justice of the Peace to the Circuit Court. The recognizances sued on in that case were executed, and the supposed appeals taken, more than ten days after the rendition of the judgments by the Justice, and after the time expired fixed by law for taking or granting an appeal. Judge Scott, who rendered the judgment of the court in that case, used this language: "The law requires recognizances to be entered into before the justice who tries the cause, and within ten days from the day of the trial or from the refusal to set aside a judgment of non-suit. If these requisites are not complied with it will be a good cause for dismissing the appeal. The Justice should see that they are conformed to; otherwise he must know that the appeal can avail nothing. After the expiration of the ten days, the officer has no *right to take a recognizance*. * * * These recognizances are not like official bonds and instruments of that character, concerning which it has been held that though the requisites of the law under which they are taken be not complied with, yet, being voluntary and not against the policy or provisions of any law, they are obligatory. If a recognizance is not taken within the time required by law the very purpose for which it is entered into may be defeated."

This case of *Adams vs. Wilson*, and the principle decided therein, are identical with the case under consideration. We do not now feel at liberty to review and unsettle the law of this case, even if we should think that the law would admit of a different construction, as it cannot be seen how any wrong could grow out of the construction of the law as given in that case, and in fact it is perhaps the best construction that could be given. It is not to be presumed that Justices will take bonds

in cases not allowed by law, therefore no damage will be apt to result from the construction of the law given, and it will not be departed from.

It is contended by the plaintiff in error, however, that the judgment ought to be reversed, because he charges that the appeal from the special term of the Circuit Court, as taken by the defendants, was irregularly taken, and that therefore the court at General Term never obtained jurisdiction of the case, and could not reverse the judgment of the court at Special Term. The charge is that when the judgment was rendered at Special Term, the defendant filed a motion for a new trial, after which the cause was continued or laid over to the next term of the court without disposing of said motion. That at this subsequent term the motion was heard and overruled, and that the defendant then appealed, which he contends was irregular. That, as there was no occasion for a motion for a new trial, there could be no continuance, and the appeal should have been taken at the term at which the demurrer to defendant's answer was sustained. This objection is very technical and as it does not appear that the plaintiff at the time took or made any objection to the course taken, but appeared at the General Term and submitted his case without objection, it is too late to complain here for the first time, even if the course taken should be considered irregular; but if the court at Special Term entertained the motion for a new trial, I know of no law that would compel an appeal to be taken before the motion was disposed of. The judgment of the court at General Term reversing the judgment of the court at Special Term, should therefore be affirmed. The other Judges concur and the judgment is affirmed.

Berlin v. Berlin.

ANN BERLIN by her next friend, DAVID M. BERLIN, Appellant,
vs. DAVID BERLIN, Respondent.

1. *Evidence—Husband and Wife—Witnesses—Communications.*—Communications between husband and wife are privileged and neither can testify concerning such.
2. *Evidence—Divorce—Witnesses—Husband and Wife—Competency.*—Husbands and wives are competent witnesses against each other in divorce suits. [Moore vs. Moore, 51 Mo., affirmed.]

Appeal from St. Louis Circuit Court.

Mauro and Laughlin, for Appellant.

Krum and Patrick, for Respondent.

The testimony of the wife and that of the husband are inadmissible in this case. The removal of a wife's disqualifications to be a witness by our statute on the ground of her interest in the event of the suit, does not remove her disability as a witness against her husband on the ground of public policy. (Johnson vs. Quarles, 46 Mo., 429; Hardy vs. Matthews, 42 Mo., 406; Dwelly vs. Dwelly, 46 Maine, 378; Mary J. Hosbrouck vs. Vandervoort, 4 Sandford, 596; 5 Selden, 153; Bird vs. Hueston, 10 Ohio, St., 418; 5 Barb., 156; Erwin vs. Smaller, 2 Sandford, 340; Wilson vs. Sheppard, 28 Ala., 623; Alcock vs. Alcock, 12 Eng. L. & Eq., 354; Manchester vs. Manchester, 24 Vt., 649.)

It cannot be said the facts of this case warranted Mrs Berlin's testimony, *ex necessitate*.

SHERWOOD, Judge, delivered the opinion of the court.

This was a proceeding instituted in the St. Louis Circuit Court on the part of Ann Berlin by her next friend David M. Berlin, against David Berlin for support and maintenance under § 1, Chapter 94, Wagner Statutes.

At the trial Ann Berlin was introduced on the part of plaintiff as a witness, and was objected to as such on the ground that, being the wife of defendant, she was incompetent to testify against him. This objection was overruled, the witness permitted to testify and defendant excepted. It was then attempted on the part of plaintiff to prove by said witness cer-

tain conversations between herself and husband and certain admissions made by him to her. This testimony was also objected to by defendant, on the ground that witness, being his wife, could not testify to such conversations or admissions. This objection was also overruled and the witness permitted to testify in the manner indicated, and defendant excepted. The court rendered judgment against the defendant for the support and maintenance of the wife, and defendant, after moving unsuccessfully for a new trial by appropriate motion for that purpose, in which was specified among others the grounds aforesaid, appealed to General Term where the judgment of Special Term being reversed, the plaintiff brings this case here by appeal.

The witness was clearly incompetent as to any conversations had with defendant, or as to any admissions made to her by him.

Communications of husband and wife *inter sese* are privileged, and are sedulously guarded by the seal of that absolute inviolability which the law places upon the hallowed intimacies of the marital relation. So strictly has the law, on the grounds of public policy, enforced the observance of this rule, that in no instance and for no purpose has its infraction ever been permitted; and on this point our statute is but declaratory of the common law. (See *Buck vs. Ashbrook*, 51 Mo., 539.)

But it is further contended that the wife, aside from the point already discussed, was incompetent as a witness against her husband in any manner whatever.

It is true that husband and wife, *eo nomine*, are not mentioned in § 1 of the act respecting witnesses; but it would seem that a fair and reasonable construction would embrace them within its provisions.

The act in question was evidently designed to work a complete change in the law of evidence and to lay its foundations anew, not on the theory of the common law, that of "human infirmity," but in the "sanction of truth, probity and personal honor."

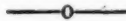
Being a statute for curing the evils which had long been

felt and acknowledged as incident to the exclusion of those most familiar with the given transaction, it should meet with a *liberal* construction in order to thoroughly effectuate its manifest purpose.

And that purpose could not in the present instance be better attained than by adhering to the rule as laid down in *Moore vs. Moore*, (51 Mo., 118), where husband and wife were held competent witnesses against each other in suits for divorce.

Let the judgment of the General Term reversing that of the special term be affirmed.

Judges Adams and Wagner concur. Judges Ewing and Vories concur in the result.



JAMES BIDDLE, Plaintiff in Error, *vs.* JOHN RAMSEY, Defendant in Error.

1. *Practice, civil, pleading—Equity—Fraud—Account—Multiplicity of suits, &c.—Jurisdiction.*—Where A. filed a bill in equity, alleging that he had demised premises to B. with the agreement that near the end of the lease, A. and B. were each to appoint an assessor, and they a third, who should unanimously assess the value of the improvements and the yearly rental, and that A. should then have the privilege of buying the improvements or should grant a renewal of the lease at the rental so fixed, and with the old covenants, and that B. had always appointed partial assessors so that no unanimous decision could be obtained, and had occupied the premises for a number of years since the expiration of the original lease without paying any rent; *Held*, that the bill was proper, and equity would entertain the suit on account of fraud, account, and the prevention of a multiplicity of suits.

Error to St. Louis Circuit Court.

Thos. T. Gantt, for Plaintiff in Error.

A party cannot by his misconduct prevent an award, and take advantage of it, in equity. (*Morse vs. Merest*, 6 Madd. Ch., 25.) An agreement of parties not to sue each other, in the adjustment of any difficulties in the courts of the country, but to submit them all to arbitration, will hardly be pleaded successfully in bar of such an action. (2 Chitty's Gen. Pr., 80, and

cases cited in notes.) Nor will a court of equity decree a specific performance of such an agreement. (1 Chitty's Gen. Pr., 851.) The defendant is protected from unlawful detainer. (1 W. S. 732, § 27.)

We have no adequate remedy at law. Under the covenant, we are entitled to an action; no such thing can be had at law.

We can, at most, only have at law damages for the breach of the agreement to arbitrate. But whether such damages are recoverable has been doubted, (12 Chitty Gen. Pr., 80, and, cases cited in notes) certainly discourages such an action.

Even if full damages were recoverable here, yet we are entitled to specific performance of our contract. We ask the performance of defendant's covenant, which the court will itself judicially ascertain, doing what the arbitrators failed to do owing to defendant's misconduct. (18 Ves., 429; *Morse vs. Merest*, 6 Madd. Chan., 25.) If we are entitled to any remedy, we are entitled under our covenant, and of this we ask the benefit, as nearly as may be, *cy pres*. We cannot have a specific performance of the contract, to refer a certain controversy to arbitration. The matters which were thus provided for *must*, by reason of the fraud of defendant, be determined judicially.

Samuel N. Holliday, for Defendant in Error.

There is no case at law or in equity, where if an award is not made at the time in the manner stipulated, the court have substituted themselves for the arbitrators and made the award. (*Blundell vs. Brettargh*, 17 Ves., 231; *Wilks vs. Davis*, 3 Meriv, 506; *Morgan vs. Milman*, 17 Eng. L. & Eq., 203; *Wallingford vs. Wallingford*, 6 Har. & J., 490; *Baker vs. Glass*, 6 Munf., 212; *Bromley vs. Jefferies*, 2 Vern., 415; *Cooth vs. Jackson*, 6 Ves. J., 34; *Gourlay vs. Duke of Somerset*, 19 Ves., 429; *Agar vs. Marklew*, 2 Sim. & S., 418; *Darbey vs. Whittaker*, 4 Drew., 134.)

An agreement to submit a question to arbitration, will not be enforced in equity, but must depend on the good faith and honor of the parties, or to such remedy in damages for a breach

thereof as the law has provided. (Tobey vs. The County of Bristol, 3 Story, 800.)

There is no allegation in the petition that the plaintiff ever demanded possession of the premises from the defendant, or that the defendant ever refused to surrender them. There is no allegation that the defendant ever refused to pay the rent.

The defendant is only bound by that contract ; the court will not make another contract for him. If the plaintiff is damaged by the fraudulent conduct of the defendant, or by his violation of any of the provisions of the lease, he is responsible in damages.

The plaintiff has an adequate remedy at law, (Abeel vs. Radcliffe, 13 Johns, 296 ; same parties, 15 Johns, 505.)

The plaintiff can turn the defendant out by unlawful detainer. The defendant cannot set up the covenant for renewal in defense, that is only to be enforced in a court of equity. (Finney vs. Cist, 34 Mo., 303.) And if the defendant attempted by bill in equity to restrain the plaintiff from getting possession under his writ of unlawful detainer, because of the covenant for renewal, it would be a complete defense to the suit in equity for the plaintiff to allege and prove that the defendant fraudulently prevented the assessors from agreeing as to the yearly value.

SHERWOOD, Judge, delivered the opinion of the court.

This was a suit in the nature of a bill in Chancery. The petition in substance sets forth that John Biddle, on the first day of January, 1853, was the owner of certain premises in the City of St. Louis, and that on that day, said Biddle demised said lot of ground to defendant for the term of ten years from and after said date, at a certain yearly rent as ascertained and set forth in a certain deed of lease of that date, executed by said Biddle and said defendant Ramsey ; that by the terms of said lease, said defendant was during the first five years of said term, to pay to said Biddle \$200 semi-annually, and for the remaining period of five years was to pay in like manner \$250 per year and also all taxes ; that said lease also provided

that within the last quarter year of the said term of ten years, Biddle and Ramsey, or their respective legal representatives, should each appoint a disinterested assessor who should assess at a fair value all brick and stone buildings then standing on said premises and also the fair yearly rent on value of said premises considered as a vacant lot of ground, for another term of ten years, commencing at the expiration of the first term. The said assessors then to be chosen were to call in a third assessor, of like qualifications with themselves to aid them in making such valuation, and when such assessors should *unanimously agree* in such estimate, said Biddle or his assignee, etc., should have the option of purchasing the brick and stone buildings and improvements erected and being on the demised premises, at the end of said first term of ten years, or giving to defendant or his assigns a further lease of ten years of said premises at the yearly rent *unanimously* fixed by said assessors, and containing the same covenants as to mode and time of paying rent and taxes as above mentioned; and if these assessors failed to make a *unanimous* award, that then, each party to the lease was again to nominate and choose an assessor on their respective parts and so on; that before the end of the first period of ten years, John Biddle died, and the title of the demised premises subject to said lease was vested in plaintiff who within the time limited appointed an assessor, and the defendant did the like; that said assessors failed to unanimously agree respecting the yearly rent of said premises, or the value of said improvements, etc.; that several assessors were in this way appointed by the parties respectively as aforesaid; that the assessors thus from time to time chosen, and the third person by them selected, failed to agree unanimously, and that this selection of assessors continued from the latter part of 1862 until 1868; that in each and every case as aforesaid, the plaintiff selected on his part an impartial and unbiased person as assessor and requested him to act according to his unbiased judgment; but defendant in each case selected as assessor on his part a partial and prejudiced person, and gave him a statement and instruc-

tions; instructing and directing him not to agree to any award fixing the rental of said premises at its actual value, but at some figure greatly below that, and at the same time to exaggerate the value of the buildings and improvements, and by this means defendant had always succeeded in preventing a unanimous award; that the making of such an award as long as defendant had the selection of one of the assessors was impossible, unless all of those so chosen should become unanimous by combining to disregard the true and actual value of said improvements, etc.; that on the first day of January, 1863, the demised premises were worth, irrespective of improvements, an annual rental of \$300,—that no rent had been paid since that date, and the value of the rental is now greater; that the improvements of brick and stone were worth \$1600 on the last mentioned date, and no more; that there was no possibility of reaching any fair and equitable valuation of said rental and buildings in the mode contemplated by the lease, owing to the continued fraud and bad faith of the defendant.

And the petition concluded with a prayer to the effect that the defendant answer the premises, that the court should judicially ascertain the value of said rental and also of said buildings, according to the true intent and meaning of said lease; that plaintiff should have his option as reserved to him by said lease, that an account be taken between plaintiff and defendant and for other and further relief.

The defendant demurred to this petition assigning as grounds therefor:

That the petition did not state facts sufficient to constitute a cause of action, because by the lease the parties had stipulated that the value of the buildings and improvements and the yearly rent of the leased premises should be fixed by assessors to be named by the parties.

Because there was no averment in the petition that defendant had refused to perform this agreement in the appointment of an assessor or that the valuation of the buildings, etc., had become impossible in the mode prescribed by the lease, by the parties themselves.

Because if defendant had committed a breach of his agreement in respect to said assessment or valuation, he would only be liable in damages.

Because from aught that appeared in said petition, the valuation of the property could be ascertained as provided for in the lease.

That nothing was alleged in the petition that showed that plaintiffs were entitled to have the value of said rental and buildings ascertained by the court, or why he should have the option reserved by the terms of the lease, or why he should have any relief as prayed for in the petition.

The petition was adjudged insufficient on this demurrer, and plaintiff declining to amend, judgment was rendered on the demurrer, and this cause comes here on writ of error.

The only question necessary for solution in this cause is, not as has been with so much adroitness urged by respondent's counsel, whether an agreement to arbitrate can be the subject of a decree for specific performance, nor whether, as has been further and with equal ingenuity urged, the court can substitute itself in place of the arbitrators, because the authorities to the contrary on both these points are unbroken in their uniformity, but whether the plaintiff on the facts stated is in this action absolutely remediless?

(For, if the allegations of the petition entitle the plaintiff to *any* measure of redress, a deaf ear will not be turned to his complaint,) simply because he thinks that justice should be dispensed to him in a particular way other than, and different from that to which he is actually entitled.

The defendant by his demurrer confesses the petition to be true; that by practices and contrivances the most inequitable and fraudulent, he has succeeded in retaining possession of the demised premises long after the termination of his term and by like means in preventing any estimate from being made of the yearly value of the rents of those premises, or any valuation of the buildings and improvements thereon, in the manner he had solemnly agreed should be done.

The arm of a court of equity would surely be shortened

were it powerless to afford relief in a case of this character, for *fraud* is that which is said to constitute "the most ancient foundation" of the power of that court.

Courts of equity also exercise a peculiar jurisdiction in matters of account.

These courts too have a concurrent jurisdiction which "extends to all cases of legal rights, where, under the circumstances, there is not a plain, adequate and complete remedy at law."

Moreover, the prevention of a multiplicity of suits is a distinct ground of original jurisdiction in courts of equity.

Now, this is a case which, in a peculiar and eminent degree, combines all these essentials of equitable jurisdiction; here an account is necessary to be taken for rents which have accrued during a long period of years; an estimate required of improvements made; a multiplicity of suits to be avoided; no plain, adequate and complete remedy at law; and finally, the sinister designs of fraud to defeat.

It must be apparent that although resort could be had in this case to an action at law; that it would fall far short of meeting the exigencies which have arisen in respect to the subject matter of this suit; such a remedy would be neither "plain," "adequate" nor "complete."

Damages would not be recoverable because there has been no breach of any contract capable of enforcement either at law or in equity.

Owing to the confessed machinations of defendant, an action for unlawful detainer could not be maintained, as he has "continued three whole years in the peaceable possession after the time for which the premises were demised to him have expired." (1 W. S., 464, § 27.)

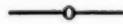
Ejectment would lie for recovering possession of the premises; but that action, however, would at its conclusion, still leave the matter of payment for buildings erected and improvements made wholly unadjusted, and new proceedings would have to be thereupon instituted for the accomplishment of the ends desired.

But in the method of procedure to which the plaintiff in the present instance has very properly resorted, one that on the facts as stated will call into activity the peculiarly flexible power of a court of equity, all matters of difference whether relating to the valuation of buildings and improvements, the taking of an account for yearly rents, or the recovery of the possession of the premises in question can be most fully and fairly adjusted, and by *one* trial and *one* decree ample and complete justice effectuated between these parties litigant.

Great care has been devoted to the examination of the authorities cited on behalf of respondent, but none of them are regarded as militating in the least against the views herein expressed.

For these reasons the petition should have been held sufficient, and the judgments both of the special and of the general term are therefore reversed and the cause remanded.

Judge Ewing having been of counsel not sitting. The other Judges concur.



HUGH MCKITTRICK, Appellant, *vs.* JAMES B. CLEMENS, *et al.*,
Respondent.

1. *Practice, civil—Garnishment—Construction of statute—Third parties interested.*—The provision of the statute (Revised Laws 1855, p. 260,) that, if the garnishee show in his answer and declare his belief, that the debt owing by him to defendant or the supposed property in his hands has been sold or assigned to a third party, and the plaintiff disputes such fact, the court shall make an order upon the supposed vendee or assignee to appear and sustain his claim, is directory.

Appeal from St. Louis Circuit Court.

M. L. Gray, for Appellant.

The defense unsupported by an actual claim set up by Barlow himself, is no defense. (30 Mo., 258; G. S., 574, §; 9, 569, § 52.)

Glover & Shepley, for Respondent.

Cutter recovered the damages as trustee for Barlow. (Van Rensselaer vs. Owen, 48 Barb., S. C., 61.)

If the plaintiff objected to this defense, the answer of the garnishee should have excepted to as insufficient.

ADAMS, Judge, delivered the opinion of the court.

The plaintiff, in March, 1865, recovered a judgment against Norman Cutter in the St. Louis Circuit Court for six thousand five hundred dollars, and afterwards in 1865, the defendants were garnisheed as debtors of said Norman Cutter upon an execution issued upon this judgment. Interrogatories were filed touching their indebtedness and duly answered, and issues joined presenting the question for our determination.

The facts are, that Norman Cutter, in 1846, commenced an action of ejectment in the St. Louis Circuit Court against the defendants for what is known as the Lirette arpent which resulted in a judgment in favor of Cutter in February, 1865, for possession of the land and for \$27,500.00 as damages for rents and profits. After the commencement of this ejectment and during its pendency, that is to say, from 1852 to 1854, the said Cutter made several conveyances of parts of his interest in the land sued for, and finally conveyed away all of his interest, and when he executed the last conveyance, he entered into an agreement with the grantee of the same date of the last conveyance, in which the following stipulations are contained concerning the then pending ejectment, "That the said Norman Cutter agrees in consideration of the agreements of the said Barlow hereinafter mentioned, to devote himself in every way in his power to the preparation for all trials and arguments, both on the law and the facts of the case of Norman Cutter vs. William Waddingham and others, now pending in the St. Louis Circuit Court of Missouri for the recovery of the Lirette arpent, and of any and all appeals and writs of error in said suit, and to the securing of witnesses and the procuring of their testimony in said case, and also to aid and assist the counsel of said Barlow in the preparation of briefs in said case, and in every way he can to furnish to him, his attorney and counsel

all books, papers, documents and information which he can furnish and procure by the exercise of all possible diligence to aid in the recovery therein and generally by all means in his power to use his best exertions to secure the success of said Barlow, his heirs or assigns, for whose benefit said suit is now being prosecuted. Said Cutter further agrees that he will at all times allow the said Barlow to control the said suit and if in the opinion of the counsel it shall be desirable to have said Barlow substituted in place of said Cutter as plaintiff the same may be done, &c., &c."

The Circuit Court gave judgment in favor of the garnishees, from which the plaintiff appealed to General Term where the judgment at special term was affirmed, and plaintiff has brought the case here by appeal.

The only point necessary for us to consider grows out of the instructions asked by the plaintiff and refused by the court. The plaintiff claimed by his pleadings that all of the rents and profits of the Lirette arpent, up to the time of Cutter's conveyance to and agreement with Barlow, were retained by Cutter and were not in any manner affected by such conveyance and agreement, and that up to that time the damages by way of rents and profits amounted to \$14,000.00. The garnishees on their part deny that this is the proper construction of the deeds and agreements, and so the pleadings and the refused instructions present this as the main point to be determined.

If there had been no suit pending for the recovery of the Lirette arpent, when Cutter made his conveyances, there might be some room for the construction that the accrued damages were not transferred. But as there was a pending suit and the subject matter of such suit was wholly conveyed with the knowledge that the assignee might at any time be substituted as plaintiff in the suit, it strikes me that the only inference to be properly drawn was that the incidents attached to the subject matter, such as the damages claimed, passed by the conveyance to the grantee. This construction, however, is not left to mere inference. It is fully maintained by the language of the agreement with Barlow which was made at the same

time with the conveyance, and taken together these papers clearly show that Cutter did not intend to retain and did not retain any interest in the damages to be recovered in that suit, and from the time of the execution of that conveyance and agreement he became a trustee of an express trust for the sole benefit of Barlow.

Under this view the money due from the defendants on the Cutter judgment was a trust fund belonging to Barlow as the real beneficiary, and could not be applied by garnishment to the payment of the plaintiff's judgment against Cutter. Under section seventy-seven of the attachment law of 1855 under which this proceeding was commenced (1 Revised Laws, 1855, page 260,) it is provided that, "If the garnishee disclose in his answer and declare his belief that the debt owing by him to the defendant or the supposed property in his hands has been sold or assigned to a third person, and the plaintiff contests or disputes the existence, force or validity of such sale or assignment, the court shall make an order upon the supposed vendee or assignee to appear at a designated time and sustain his claim to the designated property or debt, &c., &c."

This section of the statute in my judgment is directory and is intended for the benefit of all parties, the plaintiff, garnishee and claimant. If the claimant be notified and does not appear and interplead, the garnishees averment of such sale or assignment must be disregarded, and a judgment rendered after such notice will be a complete protection to the garnishee.

The court proceeded to hear and determine the garnishment in this case without regard to the provisions of this section, and neither party claimed its protection or benefits, nor was the question raised as to the validity of the deed and assignment to Barlow. The pleadings admit their validity and force and the only question presented is as to their proper construction. But if it be conceded that the force and extent of the transfer were involved, the court undoubtedly had the right under the pleadings to pronounce upon them, in the absence of the claimant, as neither party had demanded that he should be brought before the court. Whether a judgment in

this proceeding adverse to the claimant would have bound him is not a question now before the court and need not be passed on.

Upon the whole record we think the judgment was for the right party. Judgment affirmed. The other Judges concur.

—o—

STATE OF MISSOURI, Respondent, *vs.* FRANZ SCHLOTTMAN, Appellant.

1. *Practice, criminal—Criminal prosecution—Language, loud and abusive.*—Disturbing the peace of a single individual by loud and abusive language, is not a criminal offense.

Appeal from the St. Louis Court of Criminal Correction.

T. G. C. Davis, for Appellant.

ADAMS, Judge, delivered the opinion of the court.

This was a prosecution before a justice of the peace for disturbing the peace of the prosecutrix, which resulted in a verdict and judgment against the defendant from which he appealed to the St. Louis Court of Criminal Correction. In that court the defendant filed a motion to dismiss the case upon the alleged ground that the justice had no jurisdiction, and failing further to answer or appear the Court of Criminal Correction affirmed the judgment of the justice and rendered judgment against the defendant and his securities in the appeal bond from which the defendant has appealed to this court.

The following is the complaint upon which the prosecution was founded :

"STATE OF MISSOURI }
COUNTY OF ST. LOUIS } ss.

Katy Cahill

being duly sworn says that Frank Schlottman on or about the 12th day of July, 1872, at the County aforesaid, did willfully disturb the peace of this affiant by calling her a whore and that said affiant keeps a whore-house, in a loud and angry manner without any cause or provocation and against the

State v. Schuermann.

peace and dignity of the State of Missouri, and that this affiant further saith that the said Frank Schlottman, has not to her knowledge or belief been arrested, held to bail or otherwise dealt with for the said disturbance, and further saith not:

KATY CAHILL."

Sworn and subscribed to before me, this 12th day of July, 1872.

PHILIP DOHERTY,
Justice of the Peace

There was no evidence taken before the Court of Criminal Correction and no trial, the judgment of the justice was affirmed as it stood on the papers and transcript, we must therefore assume that the affidavit above set forth contains the offense for which the defendant was convicted.

There is neither assault, battery or affray charged in this complaint nor any other legal offense. The conduct of the defendant in using the language he did and in the manner indicated, was very immoral and reprehensible. It was not however such an offense as is denounced by the law as criminal and which would under our statute subject the offender to a criminal prosecution. He no doubt would be liable to a civil action for slander but I know of no statute rendering such conduct criminal. There is a statute against disturbing the peace of families or neighborhoods but none against disturbing the peace of a single individual by the use merely of loud and abusive language.

Under this view the judgment must be reversed and the prosecution dismissed. The other Judges concur.

—o—

STATE OF MISSOURI Respondent, *vs.* WILHELMINE SCHUERMANN,
Appellant.

1. *Practice, criminal—Court of Criminal Correction of St. Louis County—Justices of the Peace—Disturbing the peace.*—A. was prosecuted before a Justice of the Peace in St. Louis County, for disturbing the peace of a neighborhood, was convicted, and appealed to the Court of Criminal Correction; *Held*, though the Justice had jurisdiction to commit for trial before said Court, but not to

try, yet said court should try the case on the information filed before the Justice, or on a new one, disregarding the former trial. [State vs. Barada, 49 Mo., 504, affirmed.]

Appeal from St. Louis Court of Criminal Correction.

E. Peacock, for Appellant.

M. W. Hogan, and Francis Garvey, for Respondent, cite :
State vs. Barada, 49 Mo., 504.

ADAMS, Judge, delivered the opinion of the court.

This was a prosecution commenced before a Justice of the Peace against the defendant, for disturbing the prosecutor's family and neighborhood. The defendant was tried and convicted before the Justice, and took an appeal to the St. Louis Court of Criminal Correction, where the defendant was again tried on the original information and convicted.

He then moved for a new trial and in arrest upon the ground that the Justice of the Peace had no jurisdiction. These motions were overruled and the defendant has appealed to this court.

It may be conceded that the Justice of the Peace had no jurisdiction to try the defendant for the alleged offense. But he certainly had jurisdiction to commit him for trial by the Court of Criminal Correction, and it was his duty to have pursued this course and not to dismiss the prosecution. As he did not commit him but proceeded to try the case, and as the defendant appealed the case to the Court of Criminal Correction, it became the duty of that court to disregard the trial before the Justice, and to try the defendant on the information taken before the Justice, or on a new information to be filed by the prosecutor, or the prosecuting attorney. This point was ruled by this court in the State vs. Barada, 49 Mo., 504, and we are satisfied with that decision.

Let the judgment be affirmed. The other Judges concur.

GEORGE C. WOLFE, *et al.*, Plaintiffs in Error, *vs.* WM. D. MARSHAL, *et al.*, Defendants in Error.

1. *Duress*—*Payment of money*—*When recoverable*.—Payment of money upon an illegal and unjust demand, when the party is advised of all the facts, can only be considered involuntary, when it is made to procure the release of the person or property of the party from detention, or where the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it.

Error to St. Louis Circuit Court.

R. S. McDonald and M. Kinealy, for Plaintiffs in Error, cited: *Beckwith vs. Frisbie*, 32 Vt., 563; *Parker vs. The Bristol R. Co.*, 6 Exch., 702; *Parker vs. G. W. R. Co.*, 7 Scott, N. R., 835; *Astly vs. Renolds*, 2 Strange, 916; *Tutt vs. Ide*, 3 Blatch. C. C., 249; *Cobb vs. Charter*, 32 Conn., 358; *Cunningham vs. Munroe*, 15 Gray, (Mass.), 472; *Oates vs. Hudson*, 6 Exch 346; 1 *Parsons on Contract*, Title "Duress"; *Chitty on Cont.* Title, "Involuntary Payment"; *Claffin vs. McDonough*, 33 Mo., 415; *Dixon vs. Holden*, 7 Eq., Cases (Eng.) 488; See *Sartwell vs. Horton*, 28 Vt., 373.

Sharp & Brouthead, for Defendants in Error.

I. A person who with free knowledge of the facts, voluntarily pays money when demanded by another under a claim of right, cannot recover it back. (*Mays vs. City of Cincinnati*, 1 Ohio, (McCook,) 268; *Claffin vs. McDonough*, 33 Mo., 412; *Preston vs. Benton*, 12 Pick., 7; *Brisbane vs. Dacres*, 5 Taunton, 143; *Sessions vs. Meserve*, 46 N. H., 167; *Downs vs. Donnelly*, 5 Ind., 496; *Dickerman vs. Lord*, 21 Iowa, 338; *Patterson vs. Cox*, 25 Ind., 261; *Mowatt vs. Wright*, 1 Wendell, 355; *Baltimore vs. Lefferman*, 4 Gill, 425; *Cook vs. Boston*, 9 Allen, (Mass.,) 393; *Brown vs. McKinally*, 1 Espinasse, 279; *Evans vs. Gale*, 18 N. H., 397; *Colwell vs. Peden*, 3 Watts, 327.)

II. To render a payment involuntary or under duress, it must be made to release the person, or recover the goods of the party making the payment, from the actual custody or possession of another, or to prevent the seizure of either by one

Wolfe et al., v. Marshal, et al.

who *is armed with apparent authority* to sieze them *without resorting to an action at law*, and the fact that the money was paid upon an illegal or unjust demand, does not affect the case. (Lima Township vs. Jenks, 20 Ind., 301; Knibbs vs. Hall, 1 Espinasse, 84, and cases cited above.)

WAGNER, Judge, delivered the opinion of the court.

If we admit what is contended for by the plaintiffs, that the court erred in excluding evidence offered by them in reference to the custom of boats and the knowledge of the defendants when they purchased the boat that plaintiffs had leased the bar for a specific period, still that cannot in any wise change the final result in this cause. Plaintiffs' claim to recover is based solely upon the ground that payment of money was extorted by duress. In their petition they aver in substance that in March, 1864, one T. P. Perkins was the sole owner of the steamboat Magnolia, and that he by an instrument in writing sold and made over to plaintiffs for three years running time the bar on said boat, that by the usages and custom of steamboat trade it was understood that a sale of the bar carried with it to the purchaser the privilege of selling liquor on the boat and being provided with board for the necessary bar-keepers. That in November, 1865, Perkins sold the boat to defendants, and that after the sale and until in May 1866, plaintiffs remained in possession of the bar receiving board. That at the time last mentioned defendants demanded of plaintiffs four hundred dollars for board of bar-keepers from November, 1865 till May, 1866, threatening, in default of payment, to eject plaintiffs, their bar-keepers and goods stored in the bar from the boat. That at the time the defendants were insolvent and that under fear of injury to their persons and property, they paid defendants their demand under protest and duress. There was a second count in the petition for the payment of subsequent board under like circumstances.

The facts as shown in the testimony are briefly these: In the month of November, 1865, defendants purchased the steamboat absolutely of Perkins and received a bill of sale there-

for. Shortly after the purchase the boat went down the river and did not return until the following March, 1866. During all this time plaintiffs occupied and used the bar and kept two bar-keepers on board who were boarded and lodged on the boat. When the boat returned to St. Louis, defendants demanded of plaintiffs two hundred and fifty dollars per month for rent of the bar and board of their bar-keepers. Plaintiffs declined paying that or any other amount, and claimed that they had a lease of the bar from Perkins which gave them the right to use the same, and to have two bar-keepers boarded on the boat for three years from August, 1865.

Before the matter was settled or any definite arrangement made, the boat again went down the river and did not return till May, 1866. When the boat returned plaintiffs and defendants all met on the boat to effect a settlement. Defendants claimed that plaintiffs were bound to pay them and plaintiffs contended that they were not. Defendants finally declared that unless plaintiffs paid them, they would institute proceedings against them. Plaintiffs asked time till the next day to consult counsel, which defendants granted. On the following day the parties again met on the boat when the plaintiffs said it was a hard case all around and offered as a compromise to pay defendants one hundred and fifty dollars per month in lieu of the two hundred and fifty dollars per month demanded. After some consultation this proposition was accepted and the money was accordingly paid. It does not appear that defendants offered any violence to plaintiffs or their property. The defendants both testify that they made no threats, that they merely told the plaintiffs that if they did not pay they would take legal steps to assert their rights. One of the plaintiffs testified that the defendants said they would dispossess them if they did not pay, but they did not say how they would dispossess them, he supposed they meant by law. The other plaintiff in his evidence said that defendants threatened to open another bar on the boat and put plaintiffs' bar-keepers off, but they did not say how they would put them off. Such in

substance is the case as shown by the pleadings and bill of exceptions. There is no pretense that the money was paid under any mistake of facts, but it abundantly appears that it was paid with a full knowledge of all the surrounding circumstances. It is not claimed that there was anything more than mere words constituting the duress. There is nothing in the case going to show that defendants ever intended to resort to anything outside of the law to vindicate their supposed rights. Generally a threat of legal process is not duress, for the party may plead and make proof and show that he is not liable.

In *Claffin vs. McDonough*, (33 Mo., 412,) it was declared that to constitute duress, there must be a seizure of the property or arrest of the person or a threat or attempt to do one or the other, or facts should be stated which tend to show, or which warrant the conclusion that such an arrest or seizure could be avoided only by the payment of the sum demanded. The current of authorities is in accordance with the doctrine laid down by Lord Kenyon, (*Falliam vs. Down*, 6 Esp., 26,) that a voluntary payment of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity (unless to redeem or preserve his person or goods) is not the subject of an action for money had and received.

In *Mays vs. Cincinnati*, (1 Ohio St., 268), the court say: That to make the payment of an illegal demand involuntary, it must be made to appear that it was made to release the person or property of the party from detention, or to prevent a seizure of either by the other party having apparent authority to do so without resorting to an action at law.

The principle is very clearly stated by the Supreme Court of Massachusetts in the case of the *Boston and Sandwich Glass Co. vs. The City of Boston*, (4 Metc., 181). The court, after laying down the general rule to be "that if a party with a full knowledge of all the facts of the case voluntarily pays money in satisfaction or discharge of a demand unjustly made on him, he cannot afterwards allege such payment to have

been made by compulsion and recover back the money, even though he should protest at the time of such payment that he was not legally bound to pay the same" proceed to say, "The reason of the rule and its propriety are quite obvious, when applied to a case of payment upon a mere demand of money unaccompanied with any power or authority to enforce such demand, except by a suit at law. In such case if a party would resist such unjust demand, he must do so at the threshold. The parties treat with each other on equal terms, and if litigation is intended by the party of whom the money is demanded it should precede payment."

There are many cases on the subject and the conclusion clearly deducible from them is, that a payment of money upon an illegal and unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either and the payment is made to prevent it. But where he can only be reached by a proceeding at law, he is bound to make his defense in the first instance and he cannot postpone the litigation by paying the demand and afterwards suing to recover it back.

In the present case neither the persons nor the property of the plaintiffs were seized or detained, nor was the defendants armed with any apparent authority to seize upon either. The payment was not made to preserve the inviolability of the person or to redeem property illegally held, or to prevent its unlawful seizure. The only remedy defendants proposed was to test their rights by proceedings at law, and the plaintiffs if they did not rightfully owe the claim, should have resisted and contested the matter at law. But instead of this they proposed the compromise and now seek to recover the money back after the lapse of several years. This I do not think they can do. Applying the facts to the law I have not been able to discover that the court below committed any error in giving or refusing instructions.

Wherefore, in my opinion the judgment should be affirmed. All the Judges concur.

STATE OF MISSOURI, Respondent *vs.* CHARLES GUNZLER, Appellant.

1. *Practice, criminal—Evidence—Abandonment of wife—Divorce, suit for.*—In a prosecution under the statute for abandonment of his wife, evidence that the defendant has brought a suit for divorce against his wife, which is still pending, is no defense.

Appeal from St. Louis Court of Criminal Correction.

Gottschalk, for Appellant.

I. The judgment was contrary to the evidence, because it appeared there was a divorce suit pending at the time wherein the prosecutrix was the defendant and had the right to apply for alimony "pendente lite."

II. The filing of a divorce suit, coupled with the fact of acting under the advice of counsel, is a sufficient excuse for abandonment of wife.

EWING, Judge, delivered the opinion of the court.

This was a prosecution against the defendant, Gunzler, for abandoning his wife, and neglecting to maintain and provide for her. The defendant was found guilty and his fine assessed at fifty dollars. A motion for a new trial being overruled, he brings the cause to this court by appeal.

No question of law is presented by the record, and the only ground on which a reversal of the judgment is asked, is that there is no evidence to sustain the finding of the court.

The complaint charges, that defendant on the 5th day of December, 1871, and continually from and after that day until the day of the filing of the complaint, to-wit: Dec. 18th, 1871, unlawfully and without good cause did abandon his lawful wife, &c., and during the time aforesaid unlawfully and without good cause did fail and refuse to maintain and provide for her.

The evidence introduced on the part of the State, tended to prove that defendant's wife lived with him in St. Louis as his wife until Dec. 5th, 1871, when defendant left her, and has been absent ever since; that defendant, who is a rag-gatherer took with him certain property consisting of a horse and wagon;

that he had not furnished anything whatever since that time; that she, the wife, went to his home which is only a few blocks from where she lived for the purpose of getting assistance; but was unable to see him; that she has no means of support except her own labor and such assistance as can be furnished by two sons by a former husband, aged respectively thirteen and eleven.

Defendant introduced in evidence the record in the case of the defendant against his wife, a suit for divorce, filed in the St. Louis Circuit Court, Dec. 5th, 1871, and served by the sheriff on defendant Dec. 19th, 1871, returnable to the February Term, 1872 of said court, and then still pending therein, on the ground of indignities such as to render plaintiff's condition intolerable. It also appeared from the evidence of Mr. Gottschalk, that he brought the divorce suit as defendant's attorney, and at the time advised him that he could not legally continue to cohabit with his wife, while his suit for divorce was pending, and that he must therefore leave her. This prosecution is founded upon a statute which declares, that "every husband shall be guilty of a misdemeanor, who shall without good cause abandon his wife, and fail, neglect or refuse to maintain and provide for her. (1 W. S., p. 497, § 34.)

The charge in the information, of abandonment and failure on the part of defendant to provide for his wife, is proved by the evidence introduced on the part of the State. This is met by the evidence of a suit for divorce, instituted by the defendant his wife, and the advice of his attorney that he must leave her, nothing more. These facts evidently had no tendency to disprove the charge in the information, or to justify the defendant in abandoning his wife and in neglecting to provide for her. The defendant did not attempt to justify his conduct by showing "good cause," or any cause whatever. What the indignities were for which the defendant claimed a divorce, he did not offer to prove. Whether the abandonment was justifiable or not, was to be determined by evidence submitted at the trial, concerning the conduct of the wife towards her husband, and not by the fact that a suit for divorce

State v. Fisher.

had been instituted against her, in which she was charged with misconduct which might if proved entitle him to a decree of divorce against her.

Judgment affirmed. The other Judges concur.

—o—

STATE OF MISSOURI, Respondent, *vs.* JOHN FISHER, Appellant.

1 *Laws in restraint of traffic or alienation of property—Constitutionality—Police regulations.*—A law, which unnecessarily and oppressively restrains a citizen from engaging in any traffic, or disposing of his property, is void, even though passed under the specious pretext of a police regulation; but if it is passed in good faith, for the purpose of preserving the public health, and abating nuisances, and contains only the necessary limitations, it is valid. [Sess. Acts 1872, p. 265, and ordinance of City of St. Louis relating thereto, affirmed.]

Appeal from St. Louis Criminal Court.

H. A. Clover, and Lackland, Martin & Lackland, for Appellant.

The act of the Legislature entitled, "An act to preserve the health of the inhabitants of St. Louis County, by providing for the abatement of nuisances, and regulating the traffic in the carcasses of dead animals, within said county," approved March 14th, 1872, (See Sess. Acts of 1872, p. 265,) is void.

1st. The act proposes to create a monopoly of the trade of rendering, steaming and tanking of the remains of dead animals.

2nd. Because the act pretends to make it the duty of the City Contractor to pay one-half of the market value only for the remains of dead hogs, and virtually compels the owner or shipper to sell to him.

3rd. Because the law in reality takes away the right of the appellant to carry on the trade set out therein, and bestows it on one man.

4th. The Legislature has no power either directly or indirectly to prohibit one person from carrying on a trade and

giving another the sole privilege of prosecuting said trade.

In support of the above propositions, the following cases are cited: Sedgwick on Constitutional Law, 338, 515 and 465; 11 Wend., 539; 17 Wend., 287; 3 Page, 45; Matter of Albany Street, 11 Wend., 149; Varrick vs. Smith, 5 Paige, 137; Matter of John and Cherry Streets, 19 Wend., 659; Taylor vs. Porter, 4 Hill, 140; Gardner vs. Trustees of Newburg, 2 John. Ch., 162; Bradshaw vs. Rogers, 20 John, 103; Matter of Furman Street, 17 Wend., 649; Dickey vs. Tennison, 27 Mo., 375.

Slayback & Haeussler, for Respondent.

The object of the law was not to create a monopoly, but to protect the public.

WAGNER, Judge, delivered the opinion of the court.

The defendant was prosecuted by information in the Court of Criminal Correction, for violating an act of the Legislature entitled, "An act to preserve the health of the inhabitants of St. Louis County, by providing for the abatement of nuisances and regulating the traffic in the carcasses of dead animals," (Sess. Acts 1871, p. 265.) The second count of the information on which the trial was had charged that the defendant did unlawfully boil, render and steam the carcasses and remains of six dead hogs, he not being the owner of them, and not being at the time a butcher or pork packer, nor a person licensed or authorized to boil, steam or render the carcasses of dead animals. The defendant was convicted and sentenced to pay a fine. We might well dispose of this case on the ground that there was no evidence to support the charge in the information, but as counsel have raised the point and contended that the whole act is void, because it creates a monopoly and is in restraint of trade, we will briefly consider the question.

By the first section of the act, the purchasing of the carcasses of dead animals, for the purpose of boiling, steaming and rendering the same, and the rendering and steaming of the carcasses of such dead animals within the County of St.

Louis is declared to be a misdemeanor, except in certain enumerated cases.

The second section of the act provides that no person or persons shall purchase the carcass or remains of any dead horse, mule, ass, ox, steer, cow, sheep, hog, goat or other animal, (unless the same shall have been slain for food,) found or brought within the County of St. Louis, or boil, render or steam any such carcass or remains within said county, (unless he shall be the owner thereof,) provided that any butcher or pork packer may steam, boil or render any carcass or remains of any such dead animal for purposes other than for food, or any material entering into or pertaining to food, when the same shall have been purchased by, or consigned to such butcher or pork packer.

The third section affixes a penalty for violating the act, and provides further that the foregoing provisions shall not be construed to apply to the person or persons licensed or authorized by the City of St. Louis to boil, steam or render the carcasses of dead animals under any ordinances of, or contracts with the City; but no such person or persons, so licensed or authorized by the city, shall be permitted to boil, steam or render any such carcasses or remains of dead animals in any other place than that by the ordinances of said city provided; and provided always that such person or persons so licensed or authorized to steam, boil or render the carcasses or remains of any such dead animals, shall not acquire or be possessed of any right to, or property in any such carcasses or remains of any such dead animals, unless he or they shall pay therefor at least one-half of the marketable value of the carcass or remains of such dead hog, as such marketable value was at the time such dead hog was alive.

In accordance with the authority contained in the above recited act, the City of St. Louis passed an ordinance giving to certain persons therein named, the exclusive privilege of removing dead animals, and allowing them to boil, steam and render the carcasses of the same, on boats outside of the city, taking a bond from them for the prompt removal of all such

dead animals, and prohibiting all other persons from in any manner interfering or removing or using the dead carcasses, except as provided in the act.

The act was undoubtedly designed as a police regulation for the purpose of preserving the public health. A law which unnecessarily and oppressively restrains a citizen from engaging in any traffic, or disposing of his property as he may see fit, although passed under the specious pretext of a preservative of the health of the inhabitants, would be void. Such a law would be unreasonable, and would deprive the people of the rights guaranteed to them by the organic law of the land. But if the regulation or prohibition contains nothing more than the necessary limitations, and is passed in good faith for the purpose of preserving the public health, and abating nuisances, it is not liable to objection. No man has an inalienable right to produce disease, or trade in that which is noxious, and in every society some minor rights are surrendered for the general good.

The first section of the act forbids the purchase of the carcasses of dead animals for the purpose of boiling, steaming and rendering the same, and prohibits them from being boiled, steamed and rendered within certain limits. It is perfectly apparent that nothing can be more obnoxious or offensive, or even detrimental to the public health, than boiling, steaming and rendering the carcasses of dead animals. It is at all times disagreeable, but in the summer months it would be intolerable. If the privilege of purchasing such animals was unrestricted and depended on the mere volition of the parties, then no absolute arrangement could be effected by which the sanitary or police regulations could be carried out. Before they were sold, or the price was agreed upon by the parties, they would lie and putrify, and produce infection and disease. Therefore the only safe and practicable mode of arresting and destroying the evil is to confine the removal to persons who act under a license or contract, and who are bound to remove the carcasses promptly, and dispose of them in a way and at a place where the health of the inhabitants will not be interfer-

ed with or endangered. The act does not molest the owners of such dead animals. They have a right to use the same if they choose to do so, and butchers and pork packers when they possess the animals, either by purchase or consignment are allowed the privilege of steaming, boiling and rendering them for their own purposes, and for their own account.

We see nothing in the provisions of the act but what we think might rightfully be passed and enforced as a sanitary and police regulation. It is the duty of every well ordered government, whether State or municipal, to preserve the public health, and provide for the abatement of nuisances. Quarantine laws interfere with the free use of private property and retard and prevent locomotion, yet the health, safety and welfare of the inhabitants of a community demand their enforcement, and they have been invariably upheld as necessary police regulations.

So, railroads have been compelled to fence their tracks and assume onerous burdens without regard to their charters, and these requirements have been sustained on the ground that they were police regulations conducing to the safety of the people.

This act is not distinguishable in principle from the class of cases above adverted to. If anything would be a greater nuisance, or would more effectually destroy the health of the inhabitants of a great city, than hawking the carcasses of dead animals about the streets for sale, and steaming, boiling and rendering them, I am at a loss to conceive what it would be.

I think therefore that the law is not obnoxious to the objections made against it.

But the case must be reversed for another reason. The second count on which the defendant was tried, charged him with steaming, boiling and rendering the hogs, and there was not a particle of evidence to sustain the verdict. The evidence was that the defendant took the hogs from the stock yard and was immediately arrested, and that is all that is shown. It does not appear that there was any evidence whatever, tending to prove that he was guilty of the offense for

which he was arraigned. For this reason the judgment must be reversed and the cause remanded. The other judges concur.

—o—

STEPHEN M. CHAPMAN, Defendant in Error, *vs.* WM. L. WHITE,
et al., Plaintiffs in Error.

1. *Practice, civil—New trial, motion for—Verdict—Arrest of judgment, motion in.*—An objection to a general verdict on a petition containing two counts, that it does not specify the amount found due on each count, will not be considered by this court, if it was not alleged in the motion for a new trial or in arrest.

Error to Stoddard Circuit Court.

Kitchen & McGinness, for Plaintiffs in Error.

When there are two counts in a petition, jury must say in their verdict on which they find. (Whittelsey's Practice, 392, 393, § 324, and authorities cited; Clark's Adm'r *vs.* Han. & St. Joseph R. R. Co., 36 Mo., 215.)

Myers & Litton, for Defendant in Error.

It is too late to raise this objection to the verdict. It should have been made in the motion in arrest, so that the lower court could have had an opportunity of correcting any error it may have committed.

ADAMS, Judge, delivered the opinion of the court.

This was an action for money had and received by the defendant and for services rendered by plaintiffs for defendant. The answer is not copied into the record, but the record states that the answer was a general denial.

The plaintiffs gave evidence conducing to prove their case and the jury found a general verdict for plaintiffs without specifying on what count they found. There was a motion for a new trial which was overruled.

The point raised here is, that the jury did not find on each count or specify on what count they found their verdict, and as

Sinclair v. Bradley.

no such reason was given in the motion for a new trial or in arrest, we cannot consider it here. The object of such motion is to give the court below a chance to correct any errors that occurred before the final judgment.

There were some questions asked some of the witnesses on cross-examination by the defendant, which were ruled out by the court.

It does not appear that the answers to the questions could have had any material effect on the case, and we cannot see that there was an error in refusing to allow them to be answered.

On the whole record I see no error sufficient to justify a reversal. Let the judgment be affirmed. The other Judges concur.

—o—

ALLAN SINCLAIR, Respondent, *vs.* HUGH M. BRADLEY, Appellant.

1. *Contracts—Privity—Default of another—Statute of frauds.*—An agreement by A. to pay B. for work to be done for C. is not a contract to answer for the default of another, and need not be in writing.

Appeal from Wayne Circuit Court.

Lee and Adams, for Appellant.

Horatio D. Wood, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

The petition alleges that the defendant owes to plaintiff one hundred and sixty dollars for boarding and washing for defendant's sister for thirty-two weeks, at five dollars per week, done and furnished at defendant's request, the particulars of which are set forth in an account filed with the petition.

The answer is a general denial of the indebtedness, and a verdict and judgment were rendered for plaintiff.

The plaintiff gave evidence tending to prove his case as laid in the petition.

Hayward, Assignee v. National Insurance Company.

The defendant asked instructions to the effect, that unless the defendant's contract for boarding and washing furnished by plaintiff was in writing he could not recover. The refusal of these instructions is assigned for error.

This suit is founded upon an original contract made by the defendant with the plaintiff. The contract was not to answer for his sister's default, but it was an original undertaking to pay for board and washing to be furnished by the plaintiff to the sister of defendant. The statute of frauds does not apply to the case and there was no error in refusing the defendant's instructions.

The instruction given for the plaintiff predicated on the defendant's acknowledgment of indebtedness, might have been properly refused; but I do not see that it prejudiced the rights of the defendant, and it is not sufficient cause for reversal. Upon the whole record the judgment seems to be for the right party.

Judgment affirmed. The other Judges concur.

—o—

JOHN T. K. HAYWARD, Assignee of John A. Lennon, Appellant, vs. NATIONAL INSURANCE COMPANY OF HANNIBAL, Respondent.

1. *Agent—Notice to—Principal, when bound.*—Notice given to an agent while his agency exists, and referring to business coming within the scope of his authority, is notice to the principal.
2. *Contracts—Conditions, waiver of—Insurance, policies of.*—A condition in a policy of insurance that any other insurance on such property should avoid that policy, unless the assent of the insurer to such increased insurance was indorsed on the original policy, may be waived by acts or positive declarations, and the insurer may be estopped to set up such forfeiture, where by a course of dealing or by open actions, the insurer has induced the assured to pursue a policy to his detriment. [Hutchins vs. Western Insurance Company, 21 Mo., 97, overruled.]

Appeal from Hannibal Court of Common Pleas.

Arthur B Wilson, Hatch & Hatch, for Appellant, cited:

 Hayward, Assignee v. National Insurance Company.

Horwitz vs. Equitable Mut. Ins. Co., 40 Mo., 557; Franklin vs. Altantic Fire Ins. Co., 42 Mo., 460; Combs vs. Hannibal Savings and Ins. Co., 43 Mo., 151; Viele vs. Germania Ins. Co., 26 Iowa, 54, 55; Walsh vs. The Aetna Life Ins. Co., 30 Iowa, 142, 145; Van Bories, *et al.*, vs. United Life, Fire and Marine Ins. Co.; Am. Law Reg. N. S., Nov. 1871, p. 680.

The instructions are contradictory and the judgment should be reversed. (Schneer vs. Lemp, 17 Mo., 142; Crole vs. Thomas, 17 Mo., 329; Wood vs. St. Bt. Fleetwood, 19 Mo., 529.)

Geo. H. Shields and Thos. H. Bacon, for Respondent.

There is no evidence to support the instruction as to notice to Eby as agent, and corporations are not charged with knowledge by their agents, unless it was obtained in the course of their official and usual duties as such agents. (Mechanics Bank vs. Schaumburg, *et al.*, 38 Mo., 228; Gen. Ins. Co. vs. United States Ins. Co., 10 Md., 517-527; Story on Agency, § 140, § 140 b.; Ang. Corp., § 30 b.; Farrel Foundry vs. Dart, 26 Conn., 376-382; Weisser vs. Dennison, 10 N. Y., 68-77; McCormick vs. Wheeler, 36 Ill., 114-121; Keenan vs. Dubuque Mut. Ins. Co., 13 Iowa, 375-82; Forbes vs. Agawam Mut. Ins. Co., 9 Cush., 470-473; Ayres vs. Hartford Fire Ins. Co., 17 Iowa, 176-187; Bank U. S. vs. Davis, 2 Hill, 451-461; Franc vs. Woods, Tamlyn Rep., 172-176; Paley on Agency, p. 261, 3 Am. Ed., 1847; 1 Parsons on Contracts, p. 74, 5th Ed.; Blumenthal vs. Brainard, 38 Vt., 402-409; Mellen vs. Hamilton Fire Ins. Co., 17 N. Y., 609; Schenck vs. Mercer Co., Mut. Ins., Co., 4 Zab., 447-454; Sykes vs. Perry Co. Mut. Ins. Co., 34 Penn. St., 79.)

What constitutes notice? (Worcester vs. Hartford Ins. Co., 11 Cush., 265; Hale vs. Mechanics Ins. Co., 6 Gray, 169; Fulton Bank vs. New York and Sharon Coal Co., 4 Paige 127; Washington Bank vs. Lewis, 22 Pick., 24-31; Bank of Pittsburg vs. Whitehead, 10 Watts, 397-402; Tibbetts vs. Hamilton Ins. Co., 3 Allen, 569; Sykes vs. Perry County Ins. Co., 34 Penn. St., 79; Obermeyer vs. Globe Mut. Ins. Co., 43 Mo., 576-579; Northup vs. Mississippi Valley Ins. Co., 74 Mo., 440.)

The principal is bound by notice obtained by his agent in the discharge of his duties within the scope of his agency, but not by mere knowledge by the agent, no matter how obtained. (*Viele vs. Germania Ins. Co.*, 26 Iowa, 9; *Walsh vs. Ætna Life Ins. Co.*, 30 Iowa, 142; *Ex parte Carbis in re*, Croggon, 4 Deacon and Chitty, 354; *Perry on Trusts*, 1st Ed., p. 195, § 222; *Hill on Trustees*, 2d Am., p. 232, side 165; 1st *Parsons on Contracts*, p. 75; *Angell on Corporations*, Last Ed., p. 312 to 316; *Adams' Equity*, p. 322, side 157; 1 *Story's Eq. In.*, 10th Ed., p. 398, § 408; *Story on Agency*, 7th Ed. p. 161, § 140 c.; *Bigelow Life Ins. Index "Agent" Vol. 2.*)

VORIES, Judge, delivered the opinion of the court.

This action was brought on a policy of insurance, charged to have been executed by the defendant to John A. Lennon (plaintiff's assignee), on the 23d day of July, 1868, and by which the defendant "in consideration of the sum of twenty-one dollars paid by the said Lennon to defendant, did undertake to and did insure the said John A. Lennon for the period of six months from the date of said policy against loss or damage by fire to the amount of three thousand dollars, on his stock of merchant tailor's goods, consisting," &c.

The pleadings are very lengthy and prolix, but for the purposes of a decision upon the points presented to this court for adjudication, it will only be necessary to state the following issues made by the parties and which were passed on by the court below.

The defendant in its answer, amongst other things pleaded therein, set up the following special defenses: "For a seventh defense herein, defendant says that amongst other conditions in said policy sued on, it was an express condition in said policy as to the property on which said policy was issued, that if said Lennon should have or should thereafter make any other insurance on the property thereby insured or any part thereof without the consent of the company indorsed thereon, then and in every such case the said Lennon should not be entitled to recover from the company any loss or damage which might accrue in or to the property thereby insured or any part or por-

Hayward, Assignee v. National Insurance Company.

tion thereof, and defendant says that said Lennon did not keep said express condition, but broke the same in this: That at the time when said Lennon made his request for insurance on which said policy was issued, and at the time said policy was executed and delivered by defendant, the said Lennon had other insurance on said property than the insurance alleged in plaintiff's petition. That is to say, insurance in the——— Insurance company of——— for the sum of three thousand dollars, without defendant's consent to said other insurance indorsed upon said policy sued on, nor did defendant ever consent to said or any other insurance. And defendant says that thereby said Lennon became not entitled to recover from defendant any loss or damage which accrued in or to said property or any part or portion thereof."

The eighth defense set up by defendant is the same as the one above set forth except that the breach of the condition is charged to be, that said Lennon after the execution of the policy sued on, and its delivery to said Lennon, made other insurance on said property, in the sum of three thousand dollars in the "Phoenix Insurance Company of Hartford, Connecticut," without the consent, &c.

The plaintiff in his replication to these defenses admits the condition in the policy as stated, and that said Lennon had at the time of the execution of the policy other insurance on the property insured in the sum of \$3,000 as stated in the answer, but to avoid the effect of the supposed breach as stated by the defendant, the plaintiff avers, "that before and at the time of the issuing of said policy defendant well knew and was fully advised of the fact of such other insurance upon said property, and plaintiff avers that defendant at the time it issued its said policy and received the premium therefor from said Lennon, waived the condition in said policy requiring notice of other insurance to be given to it, and furthermore waived the condition of said policy requiring consent of such other insurance to be indorsed on said policy in writing, and plaintiff further avers that defendant at the time aforesaid, consented to said other additional insurance."

To the eighth defense set up in defendant's answer as above stated, the plaintiff replied: "That he admits that after the time of the issuing of the policy sued on, to-wit: on the—day of — and at the time of the expiration of the said previous additional insurance above referred to, the said John A. Lennon with the knowledge and consent of the defendant at the time, procured in place of said previous additional insurance the same amount of insurance, to-wit: in the Phoenix Insurance Company of Hartford in the State of Connecticut, and last named insurance was in force at the time of the burning of the goods named in plaintiff's amended petition, of which facts defendant had full knowledge and was fully advised of the renewal thereof in another company, and consented thereto, and plaintiff avers that defendant at said time waived the condition in said policy sued on, set out in defendant's eighth ground of defense, requiring notice of additional insurance to be given to defendant, and then and there waived the requirements of said condition requiring defendant's consent to such additional insurance to be indorsed on said policy in writing."

There were many other issues in addition to the above in the pleadings, but they are not brought in question in this court, so that it will only be required that I should state the substance of the evidence applicable to the foregoing issues, and the rulings of the court thereon, to give a fair understanding of the matters complained of by the appellant, and upon which he relies for a reversal of the judgment in this cause.

It appears from the evidence in the cause, that at and before the execution of the policy sued on to John A. Lennon, said Lennon was doing business in the city of Hannibal, as a merchant tailor, that his stock of goods amounted to from seven to eight thousand dollars, that one David S. Eby also resided in Hannibal and followed the business of an insurance agent, that he was agent for several insurance companies in the Eastern States as well as being agent at Hannibal for defendant.

That said Lennon had taken two policies of insurance from said Eby for three thousand dollars each, one in each of two

Hayward, Assignee v National Insurance Company.

Eastern companies for which Eby was agent, and that he had transacted the business with and procured the policies from said Eby.

That in the month of July, 1868, shortly before the making of the policy sued on, Eby told said Lennon that one of his policies of three thousand dollars was about to expire, and that he could not renew it at the same rates that he had been charged before. Eby testified that he was the vice president of the defendant and agent for several insurance companies, had his office in the same room with the president and secretary of defendant, that he was in the habit of taking risks for the defendant most generally in consultation with the other officers of the company; when the risks were out of the ordinary run of business, there was a general consultation; that he thought he was authorized by virtue of his position as agent to take risks generally. Haynes, the president, and Meadows the secretary of defendant were both apprized of the issue of the policy to Lennon upon which the suit is brought, before it was issued. Eby further stated that he was carrying six thousand dollars on Lennon's stock. A short time previous to the expiration of one policy he had a conversation with Meadows and Haynes, and told them that there was an opportunity of taking three thousand dollars on Lennon's stock, as he could not renew it in the company that it was in; after consultation with the company they agreed to take the risk. The company knew that he was carrying six thousand dollars insurance for Lennon at the time, did not know whether he received the premium from Lennon or whether the company received it. When Lennon was informed that one of his policies was about to expire, and that it could not be renewed at the same rate as before, he told Eby that he wanted it renewed and requested him to continue it, said he had too much stock on hand to suffer any of his insurance to drop, he said he had about \$8,000 in stock or over, that he wanted the policy continued.

The evidence further shows that after Eby had the consultation with the other officers of defendant, that he made out the policy upon which this suit was brought and when the old

policy had expired he handed it to Lennon who objected to it, said he did not want to be put in the National, but that Eby assured him that it was a good company, and he then received it, telling him that he took it on his word, that he never examined the policy until after the fire which destroyed his goods.

The evidence further tends to show that Eby continued to be agent and vice president of the defendant until after the month of September, 1868. In September, 1868, Eby was as agent of an Eastern company still carrying the three thousand dollar policy on Lennon's goods in addition to the policy in suit, that at said time said policy was about to expire, Eby told Lennon that the policy was about to expire and that he could not renew it at the same rates paid before. Lennon said he wanted the policy renewed. Eby told him to wait a few days and he might still be able to renew it, that afterwards on the day the policy expired Eby told Lennon that he was then prepared to renew the policy. Lennon told him he was too late that he had just insured in another company, and thus renewed the amount of the three thousand dollar policy. Eby told him that that was all right. Eby states that he thinks he was still vice president and acting as agent of defendant at the time of this last conversation.

The foregoing is substantially the evidence in the cause in reference to the knowledge and consent of defendant as to the three thousand dollar insurance on the property in addition to the policy sued on, either at the time of the execution of the policy by the defendant, or at the time that said insurance was changed to the Phoenix company in September afterwards.

The question presented for the consideration of this court is, whether the evidence in this case or the circumstances under which the policy sued on was executed and delivered to Lennon, were such as to amount to a waiver of the condition in the policy, that the policy should be void or no recovery had thereon, if the insured should have other insurance on the same property which was not made known and not indorsed on the policy? And whether the condition was waived that required notice to be given and indorsement made thereof on

the policy of any additional insurance being afterwards made on said property? Or whether the defendant was estopped from setting up the breach of said conditions as a defense to the action?

In my mind there can be very little doubt as to the three thousand dollar policy which existed on the property at the time the policy was executed by the defendant. Eby, the agent and vice president of the defendant, had executed and delivered to Lennon two policies, as agent for Eastern companies, one of which was about to expire. Lennon wanted it renewed, but Eby could not renew it on terms to suit. This being the case he had a consultation with the President and Secretary of defendant, in which he informed them of the whole matter, and that there was a chance for the defendant to take a risk for three thousand on Lennon's goods in place of the policy about to expire. After a full consultation they concluded to take the risk, and the policy was made out before Lennon was seen on the subject and the same afterwards handed to him. He hesitated to receive it until he was assured that the company was a good responsible one; when he accepted the policy without ever looking at its contents, as the evidence shows. It was evidently known by all parties that the remaining three thousand dollar policy was to continue on the property insured, because Lennon had informed them that he could not afford to let any of his insurance be *dropped*. Lennon had a right to expect under these circumstances, that defendant had indorsed on the policy its consent to this remaining policy of three thousand dollars, which good faith required it under the circumstances to have done. So far as this prior insurance is concerned, the case comes exactly within the principle laid down in the case of *Horwitz vs. The Equitable Mutual Insurance Company*, 40 Mo., 557. The defendant considered the whole matter in reference to the insurance already on the property and took the risk in reference thereto, and they should be estopped from setting up the breach of said condition as a defense to the action, said breach having been waived. In reference to the renewal of the insurance at a time

subsequent to the execution of the policy sued on by the defendant, or the changing the same to another company, the evidence is not so clear of an intention to waive the condition requiring the defendant's knowledge and consent thereof to be indorsed on the policy. It is contended by the defendant that it was not notified of said subsequent insurance, and that it never in any way assented thereto, while on the other hand, it is contended by the plaintiff that the evidence shows that defendant had full notice of the subsequent insurance and assented thereto and so acted as to induce the said Lennon to rest in security in the belief that his property was fully insured. The main question in the case is, whether notice of this subsequent insurance to the agent who effected the risk for defendant will be considered as a notice to the defendant. For I think that the evidence clearly shows that Eby was still Vice President and agent for the defendant, at the time that this last insurance was effected. At least, if there were any doubts as to his agency at the time, that fact ought to have been submitted to the jury by a proper instruction.

The authorities upon this last question are somewhat in conflict and cannot well be reconciled with each other. The cases referred to by the defendant in the Massachusetts Courts, and other cases referred to, seem to accord with the views entertained by the defendant.

In the case of the General Insurance Company vs. United States Insurance Co., 10th Maryland, 517, the question was as to notice by the corporation of an unrecorded deed of mortgage, so as to affect a subsequent mortgage. It is there held, that the notice in such case must be sufficient to put a party on enquiry, and that, conceding that a director of the corporation to be affected had notice of the prior mortgage, it did not appear that he had communicated the notice to the board of directors, and was therefore not sufficient; that the notice received by a director of a corporation in a private way or which he acquired from rumor, would not bind the institution, that the case must be so clear as to satisfy the mind that the allowance of the subsequent claim would be a fraud on the party

setting up the first deed, and to the same effect is the case of Farrel Foundry vs. Dart, 26 Conn., 376. The case of the Worcester Bank vs. Hartford Insurance Company, 11 Cush., 265, was a case where the policy sued on, contained a clause almost precisely similar to the clause in the policy of defendant under consideration. It was held that in such case, where a subsequent insurance had been obtained and the agent of the company notified thereof and he had promised the assured to have the consent of the subsequent insurance entered in the policy but failed to have it done, that still the policy is avoided, the technicalities of the contract not having been complied with, and to the same effect are several other cases in Massachusetts.

It is contended by the defendant in this case that no notice to an agent of the company could operate as notice to the defendant, unless the agent received the notice at a time in which said agent was engaged in the execution or performance of the business to which the notice related, or unless it is shown that the agent communicated the notice to his principal. To sustain this view of the case reference is made to several cases.

In the case of McCormick vs. Wheeler, 36 Ill., 114, (referred to by the defendant,) it is held that notice to an attorney of one party which he had received while acting as the attorney of another party is not such notice as will affect his client. It is remarked by the Judge delivering the opinion in the case that "the English authorities manifest a disposition to depart from this rule, but it is deemed by the court to be a rule just in itself."

In the case of the Mechanic's Bank vs. Schatmburg, *et al.*, 38 Mo., 228: Judge Holmes delivering the opinion of the court says, that "knowledge acquired by the President, Cashier and Teller while engaged in the business of the bank in their official capacity, will be notice to the bank; so far as either has authority to act for the bank, his acts are the acts of the bank, and his official knowledge is the knowledge of the bank; but mere private information obtained beyond the range

of his official functions will not be deemed notice to the bank."

It is difficult to exactly understand what is meant by the language used in these decisions. The defendant contends that it is meant by the decisions referred to as well as other decisions using similar language, that no notice served on an agent will be effectual to bind his principal, unless the agent should receive the notice while actually engaged in the transaction of the very business to which the notice relates, or unless 'tis shown that it was communicated to the principal. If that should be the proper construction to be given to the language, then it would become impossible that an agent of an insurance company could ever be notified of a subsequent policy of insurance being issued upon the same property before insured by said agent for his principal. Every agent as soon as he takes a risk and issues a policy therefor and delivers it to the insured, dismisses the subject of that policy from his mind. If the insured should afterwards procure a subsequent insurance on the same property and go to the agent to give him notice thereof, he would be sure to find the agent in the transaction of some other business, when according to the construction given to these cases, no notice could be given to the agent because he was not at the time engaged in the particular business to which the notice related, and this, notwithstanding the agent was the only agent of the corporation whose business it was to attend to the very matter to which the notice related.

I think that this is not the proper construction to give to these cases; the meaning must be that the notice must be given to the agent while his agency exists, and it must refer to business which comes within the scope of his authority; when this is the case I think that notice to the agent is notice to the principal, in fact there is no other way to notify a corporation than to notify an agent. A corporation only acts through and by agents, and the proper and only way to give notice to a corporation is to notify an agent, and generally it is sufficient to notify an agent whose proper business is to attend to the matter in reference to which the notice is given.

In the opinion of Judge Holmes in the case of the Bank vs. Schaumburg, *et al.*, above referred to, Story's Agency, § 140, is referred to, from which it may be seen what was meant by the language used in that decision. The section referred to, reads as follows: "Upon a similar ground notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is at the time connected with the subject matter of his agency; for upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal, and if he has not, still the principal, having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory on the principal, otherwise the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party, but unless notice of the facts come to the agent while he is concerned for the principal, and in the course of the very transaction, or so near before it that the agent must be presumed to recollect it, it is not notice thereof to the principal; for otherwise the agent might have forgotten it, and then the principal would be affected by his want of memory at the time of undertaking the agency. Notice therefore to the agent before the agency is begun, or after it has terminated, will not ordinarily affect the principal."

This quotation from Story, seems to me to solve the whole question, which is that, *notice to the agent before his agency has begun, or after it has terminated, will not ordinarily affect the principal*. If notice is given before the agency has begun, to affect the principal it must be so near before it that the agent must be presumed to recollect it.

This rule as laid down by Judge Story I think is the correct one, and must be the proper interpretation to be given to the language used in the cases on the subject.

Now, to return to the facts of the case under consideration, we find that Lennon in the month of July, 1868, had procured from one Eby two policies of insurance for \$3000 each, one in each of two Eastern companies for which said Eby was agent.

That said Eby was also agent for defendant, having authority to take risks and issue policies for it. That one of the Eastern policies was at said time about to expire. That Eby informed Lennon that he could not renew the policy on the same terms that the policy had been issued before. Lennon insisted that he wanted the policy renewed, that he could not afford to drop any part of his insurance, that he was not then fully insured, that his stock of goods was heavy, &c. Under these circumstances, Eby communicated the facts in reference to this matter to the President and Secretary of defendant, telling them that one of Lennon's policies was about to expire and that there was a chance for defendant to take the risk for three thousand dollars in place of the policy about to expire. After full consultation it was concluded to take the risk for \$3000 dollars and a policy was executed to Lennon therefor, without any application on his part therefor, and in fact without his knowledge and that when it was delivered to him, he first objected to receive it, but upon being assured by Eby that the company was a good one he received the policy. At this time it was well known to Eby and defendant, that Lennon intended to continue the one Eastern policy upon his goods, and that he did not intend in any way to lessen or diminish his insurance. This being the case, sometime in the month of September or October of the same year, when the second or last Eastern policy was about to expire, Lennon was informed by Eby (who the evidence shows was still agent of defendant) of the fact and that he could not renew it on the same terms that it had been originally issued. Lennon expressed a desire to have the policy renewed and wanted to keep up his insurance. Eby at this time told him to wait a few days, that he might yet be enabled to renew the policy. Lennon did wait until the day that the policy expired, and then insured in another company in the same amount, and upon meeting with Eby, he informed him of what he had done, and was told by Eby that it was all right.

Now under the circumstances had Eby, the agent, notice at the time of the change of the policy procured from him in the East-

ern company for the policy to the same amount in the Phoenix Company and did he assent thereto? And did such assent amount to a waiver on the part of the defendant of the condition in the policy, avoiding the same where additional insurance is taken without the consent of defendant indorsed on the policy, as has been before stated? That Eby knew of the new policy, there can be no doubt, in fact it was known by Eby and the officers of defendant at the time of the issuing of the policy sued on, that Lennon intended to continue the whole six thousand dollars of insurance on his stock of goods. The policy of defendant was made with that view, and what was afterwards done was only carrying out the understanding had between the parties at the time; hence when the policy was about to expire, Eby told Lennon that the policy was about to expire, and that he could not then renew it on the same terms, but to *wait* a few days that he might still become able to renew it. Why was it that Eby asked him to wait? It was to my mind, because it was known and expected that if Eby did not renew the policy the insurance would be taken in another company, and this was only a continuation of the original understanding and was expected by Eby, and when he was told that it had been done, he answered that it was all right. Eby was at the time still the agent of the company and notice to him was notice to the defendant.

In a late case in the State of Illinois, (*Illinois Mutual Fire Insurance Company vs. Malloy*, 50 Ill., 419.) The policy in question contained a clause to this effect: "If the assured shall thereafter make any other insurance on the same property, and should not with all reasonable diligence give notice thereof to the insurers, and have the same indorsed on the policy or otherwise acknowledged by them in writing, the policy shall cease and be of no further effect." The insured in that case did effect an additional insurance on the same property. It was held that it was not sufficient in such case to give notice to a stranger who had long since ceased to be an agent of the company. The court, however, in rendering the opinion says, "Had the party notified been the agent of

the company, his failure to indorse consent on the policy would not have prejudiced the assured; as we said in the case of *N. E. Fire and Marine Insurance Co., vs. Schettler*, 38 Ill., 166." It was however further held in that case that it was the duty of the assured to know that the party notified was agent. This case seems to sustain the view that a notice to one who is known to be an agent is sufficient to charge the company, and that where notice is given of an after insurance and no objection made at the time, that the policy will not be thereby forfeited.

I do not say that the fact that Lennon told Eby after he had taken the last policy that he had given the risk to another company, would have been sufficient of itself to constitute a waiver of the condition in the policy in question; but this fact taken in connection with all of the other facts connected with the transaction, I think are sufficient; and that to permit the defendant to insist on a forfeiture of the policy under all of the circumstances, would be to enable it to perpetrate a fraud on Lennon.

In the investigation of the case, it has not been overlooked that this court in the case of *Hutchinson vs. The Western Insurance Company*, 21 Mo., 97, held that a condition in a policy similar to the one under consideration was a condition precedent to the right of the insured to recover on the policy, and that nothing would prevent a forfeiture of the policy, but the actual indorsement of the consent of the insurer to the subsequent insurance. Subsequent cases, however, in this court as well as in other courts which seem to have been well considered, have recognized a more liberal rule in favor of the insured. In these late cases, it has been held that the condition in the policy under consideration as well as other conditions of similar nature, may be waived by the company, and that the waiver may be made as well by "acts as by positive declarations, and that the company may be estopped under certain circumstances, where by a course of dealing or its open actions, it has induced the assured to pursue a policy to his detriment." (*Horwitz vs. The Equitable Mutual Ins. Co.*, 40 Mo., 557; *Franklin vs.*

The Altantic Fire Ins. Co., 42 Mo., 456; Combs vs. Hannibal Savings and Insurance Co., 43 Mo., 148; Northrup vs. The Mississippi Valley Insurance Company, 47 Mo., 435; Viele vs. Germania Ins. Co., 26 Iowa, 54-55; Walsh vs. The Ætna Life Ins. Co., 30 Iowa, 133; Van Bories vs. The United Life, Fire and Marine Ins. Co., 8 Bush., (Ky.) 133.)

The Common Pleas Court on the trial of this cause instructed the jury "that it devolved on the plaintiff to show that consent was given by the company to such other insurance and indorsed on the policy sued on, and unless the jury find from the evidence that such consent was indorsed on said policy sued on, they will find for the defendant." This instruction assumes that no waiver of the condition in the policy could be made by the company, but the jury are told that unless the indorsement of consent was actually made on the policy, they must find for the defendant. This instruction was clearly wrong, and ignored the whole issues in the case to which it referred as made up by the pleadings. It is, however said, that this instruction was modified by another instruction given by the court; this upon examination will be found to be incorrect; there is no instruction given by the court that could be construed to be a modification of the one above referred to. There is another instruction which tells the jury that if the policy securing the additional insurance had expired before the loss, that then, although the consent of the company to the same, was not indorsed on the policy, the plaintiff might recover. This instruction only applied and could only apply to the insurance existing on the property at the time of the issuing of the policy sued on, as there was no pretense that the subsequently procured policy had expired. And the first instruction referred to was complete in itself, and so far as the instruction given by the court to which reference is made, differs from it, it is merely inconsistent with the other instruction given and calculated to mislead and confuse the jury.

It is not necessary that any further notice should be taken of the instructions given or refused, the case must be reversed for the erroneous view taken of the case in the instruction referred to.

The other Judges concurring the judgment of the Hannibal Court of Common Pleas is reversed and the cause remanded for a new trial.

WM. B. PHILLIPS, Defendant in Error, *vs.* ELIZABETH J. MAHAN, Plaintiff in Error.

1. *Limitations, statute of—Note—Partial Payment—Indorsement.*—An indorsement of partial payment, made on a note by the holder without the privity of the maker, is not of itself sufficient evidence of a payment to repel a defense created by the Statute of Limitations; but such indorsement made by the consent of the maker is sufficient.

Error to Marion Circuit Court.

Glover & Shepley, and W. H. Bliss, for Appellant.

"A credit given by plaintiff, on an account which would otherwise be barred on its face, without proof of payment by defendant does not take the debt out of the operation of the statute of limitations." (Taylor & McDonald, 2 Rep. Con. Ct., cited in Vol. 4, U. S. Dig., p. 813, § 482.)

"The indorsement on a note of part payment, made by the holder and uncorroborated by other evidence of payment, is not sufficient evidence to take the note out of the statute of limitations." (Connelly & Pierson, 4 Gilm., 108.)

The following decisions show the strictness with which the courts have ruled, touching the question of part payment. (Clapp vs. Ingersol, 2 Fairf., 83; Arnold vs. Dowling, 11 Barb., S. C., 554; Maskell vs. Pooley, 12 La. An., 661; Wate-man vs. Burbank, 8 Mete., 352; McGehee vs. Greer, 7 Porter, 537; McCullough vs. Henderson, 24 Miss., 92; Anderson vs. Robertson, 24 Miss., 389.)

It is not proof of an oral agreement to enter a part payment, but an *actual part payment*, which the statute demands.

Dryden & Dryden, for Defendant in Error.

Money is not necessary to be used in order to a partial payment such as to avoid the statute. The defendant got value from the plaintiff, and by the mutual agreement of the parties the thing to which the agreement related was indorsed *as a payment* on the note.

EWING, Judge, delivered the opinion of the court.

This suit originated before a Justice of the Peace and was founded on a note executed by the defendant to plaintiff, where there was a judgment for plaintiff, from which an appeal was taken to the Circuit Court, and a judgment being again rendered for plaintiff, defendant brings the cause to this court by writ of error.

The defense to the action was the plea of the statute of limitations. The note sued on was dated January 1, 1858, due one day after date, and summons was issued February 27, 1869. On the note appears a credit as follows, "by amount paid on barrel of flour, \$6, March 20, 1859." The evidence tended to prove that after the note was executed, to-wit, in the year 1859, plaintiff sold to defendant divers articles of merchandise, including sundry barrels of flour, and that the defendant executed another note for the amount, being \$53; that afterwards it was "ascertained and agreed between plaintiff and defendant, that the amount of said note was \$6 in excess of the sum due; that said mistake grew out of the fact that defendant was charged by plaintiff with one barrel of flour for which she should not have been charged, and the value thereof was embraced in said note; that afterwards, to-wit: in 1860, it having been ascertained and agreed between plaintiff and defendant, that said note for \$53 was for \$6 more than it should have been, plaintiff proposed to defendant that the said excess of \$6, should be credited on the note sued on in this cause, and that defendant consented thereto, and that such credit was according to such agreement indorsed on the note sued on by the plaintiff.

The court instructed the jury at the instance of plaintiff to the effect, first, that if the defendant at any time, within ten

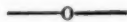
State v. Rochforde et al.

years prior to the institution of this suit, paid to the plaintiff any portion of the note sued on, on account thereof, the verdict on the issue would be for the plaintiff, and,

Second, that if the plaintiff was indebted to the defendant, and within ten years before this suit was brought, it was agreed between plaintiff and defendant that the indebtedness of defendant should be discharged by making it a payment and credit on the note sued on, and that plaintiff did within the time aforesaid, make the discharge and accept it as payment and give it as a credit on the note sued on, then the verdict ought to be for plaintiff.

This is not a case where the mere indorsement of a credit on the note is relied on to take the case out of the operation of the statute. Such an indorsement of partial payment made by the holder of the note, without the privity of the maker, is not of itself sufficient evidence of payment to repel a defense created by the statute of limitations. (*Rosebaum vs. Billington*, 17 Johns, 182; 4 Pick., 110.) But no such theory was presented by the instructions given at the instance of plaintiff. On the contrary, the jury were told that no effect could be given to a mere indorsement of a credit on the note unless it was the result of an agreement between the parties, that it was to be a discharge to that extent of the debt due the plaintiff from the defendant, and accepted as such by the plaintiff. There was evidence tendered to prove these facts, and the question whether there was such an agreement or not respecting the credit, was properly submitted to the jury.

Judgment affirmed. The other Judges concur.



STATE OF MISSOURI, Respondent, *vs.* JAMES ROCHFORD, *et al.*,
Appellants.

1. *Practice, criminal—Informations—Definiteness.*—A criminal information should be sufficiently definite to put the defendant in possession of the charge for which he is held to answer.

*Appeal from St. Louis Court of Criminal Correction.**Mauro and Laughlin*, for Appellants.

The complaint does not sufficiently describe the offense.

R. S. McDonald, for Respondent.

The complaint sets forth the offense charged, fully and clearly according to the language of the Statute. (W. S., p. 496.)

WAGNER, Judge, delivered the opinion of the court.

The defendants moved to dismiss the information in this case, because the same was insufficient, and afterwards moved in arrest of judgment for the same reason, both of which motions were overruled. The ruling of the court on these motions constitutes the only question for our consideration, as the record discloses no other point of law saved. The information is not only inartificially drawn, but it is absolutely wanting in certainty. It alleges that the defendants, wickedly devising and intending to defraud and prejudice the St. Louis Gas Light Company, conspired and confederated and agreed together, fraudulently and feloniously to commit larceny by stealing, taking and carrying away the property, goods and chattels of the said company, and that in pursuance of said conspiracy, they unlawfully and feloniously altered, changed and tampered with a certain gas meter, the property of the said company, with the intent to steal, take and carry away certain valuable property and goods of the company.

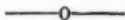
The information, it will be observed, does not specify any particular property or goods that the defendants conspired to steal, or that they intended to take or carry away. They are charged with altering and tampering with a gas meter, but it is not alleged that they either took the meter or the gas. It is averred that they intended to take certain property, but what property is not designated. There is nothing here sufficiently definite to put the defendants in possession of the charges for which they were held to answer.

The information is founded upon the statute, (1 W. S., p. 496,

§ 29,) defining conspiracies, and assessing punishment for the same. But the 30th section of the act provides that no agreement, except to commit a felony upon the person of another, or to commit arson or burglary, shall be deemed a conspiracy, unless some act besides such agreement be done to effect the object thereof, by one or more of the parties to such agreement.

The charge in the present case does not come within either of the above enumerated exceptions. It was not for committing a felony upon the person of another, nor was it for arson or burglary. There is no allegation that the defendants did any act in reference to any specific property.

The judgment should be reversed and the information dismissed. The other Judges concurring



BOATMENS' SAVINGS INSTITUTION, Respondent, *vs.* ISAIAH
FORBES, *et al.*, Appellants.

1. *Practice, civil—Defenses, withdrawal of.*—A party to a suit may at any time withdraw any defense set up by him.
2. *Practice, civil—Pleadings—Notes—Sureties—Allegations.*—When a party sets up as a defense against a note that he signed it as surety, he must state the name of the principal.
3. *Practice, civil, Pleadings—Sureties—Notes, Extension of—Payments—Presumptions.*—Where in the plaintiff's petition on a note it is alleged that payments were made after maturity, and the defendant claiming to be a surety alleges that the note was extended without his consent, but does not deny the payments, such failure to deny the payments is a presumption that they were made with his knowledge and consent, and will amount to a ratification of the agreement to extend the time of payment.

Appeal from St. Louis Circuit Court.

John Wickham, for Appellants.

I. Where several parties, all apparently makers, sign the same note, parol evidence is admissible to show that one signs as principal and the others as sureties. (Parsons on Notes and Bills, 233, note a; Garrett, *et al.*, vs. Ferguson's Adminis-

trator, 9 Mo., 128, 129; Scott vs. Bailey, 23 Mo., 147, 150; Smarr vs. Schnitter, 38 Mo., 481.)

II. The Court erred in refusing to permit appellant to strike out portions of his answer.

Lackland, Martin and Lackland, for Respondent.

The affidavit for a continuance states that defendant, Parker, expected the witness Downing to prove that the note sued on was executed and discounted for the benefit of the Philharmonic Society, and that defendant Parker signed the same for the accommodation of said Society; and was properly overruled, because the Philharmonic Society was not a party to the note.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a promissory note for sixty-six hundred and seventy-eight dollars and fifty-seven cents.

The petition alleged that the plaintiff was a corporation duly created under the laws of this State, and that the defendant duly executed the note sued on to one William Downing, who negotiated and transferred the same to plaintiff. The petition states that on the 18th day of August, 1869, there was paid on the note three thousand dollars, and also a payment of one thousand dollars on the 23rd of September, 1869, and claimed judgment for the balance and interest.

Several of the defendants filed separate answers denying the existence of the plaintiff as a corporation, and denying the transfer of the note to plaintiff, and claiming other credits not allowed by the petition.

The defendant, George W. Parker, by an amended answer denied the existence of plaintiff as a corporation, and denied the transfer of the note to plaintiff, and also set up as a defense, that he was only surety upon the note, but did not state that any of the parties to the note were principals, nor for whom he was surety. He further alleged, that without his knowledge or consent the plaintiff made an agreement with the principal debtor and some of the co-sureties by which the time of payment of the note was extended for four months

from the 26th of February, 1868, to the 29th of June, 1868, and afterwards made another extension in the same way from the 29th of June, 1868, to the 2d of July, 1869.

The replication denied that defendant, Parker, was only surety, and alleged that he signed the note as principal with the other defendants, and denied the plaintiff had any knowledge that he was surety, and admitted the alleged extensions, but charged that they were made with the knowledge and consent and at the request of Parker.

A verdict and judgment were given against the defendants for the balance of the note, from which the defendants appealed to the General Term, where the judgment at Special term was affirmed, and an appeal taken to this Court.

The defendant, Parker, offered to withdraw that part of his answer denying the legal existence of the plaintiff and the transfer of the note, so that he might have the opening and conclusion before the jury. The Court refused to permit him to do this, and this action of the Court is relied on here to reverse the judgment.

We think that the defendant may at any time withdraw any defense set up by him, but the refusal of the Court in this case to suffer this to be done did not in any manner operate to the injury of the defendant, Parker, as the separate answers of the defendants put the same matters in issue, and consequently gave the plaintiff the right to open and conclude the argument before the jury.

When the case was called for trial the defendant, Parker, applied for a continuance on the ground of the absence of a witness, by whom he alleged he expected to prove that he executed the note in suit with the other defendants at the request and for the accommodation of the Philharmonic Society; and that the time of payment of the note had been extended as stated in his answer, without his knowledge or consent. This motion for a continuance was overruled, and the defendant excepted. On the trial of the case he offered to prove the same facts by other witnesses, and the Court ruled out the evidence. There is no pretense here that the Philharmonic

Kortzendorfer v. The City of St. Louis.

Society, whether it was a corporation or a private co-partnership, was a party to this note, nor is it claimed that either of the signers of the note was a principal and the others his sureties. The defendants, so far as the record or the proof given or offered shows, stood toward each other, and as to the payee or holder of the note, as principals.

In giving this note the defendants may have loaned their credit to the Philharmonic Society, but as to the creditor or holder of the note they are all principals.

But even if the defendants under any view of the case might be treated as mere sureties, this fact was not properly pleaded. The answer does not allege who was the principal for whom the defendant, Parker, engaged as surety. Besides, the petition sets forth payments as having been made to large amounts soon after the expiration of the time of the alleged extensions. These payments are not denied and the presumption therefore is, that they were made by all the defendants or by their consent and knowledge. This being the case, such payments would amount to a ratification of the agreements to extend the time of payment, and therefore if it be conceded that the defendant, Parker, was a mere surety, he could not claim a release by reason of extensions of time of payment which he had thus ratified. I find no error in the record sufficient to reverse the judgment.

Judgment affirmed. The other Judges concur.

—o—

BANTHEMY KORTZENDORFER, Plaintiff in Error, *vs.* THE CITY
OF ST. LOUIS, Defendant in Error.

1. *Practice, Civil, Pleading—Answer—Traverse of allegations of petition.—*

When the new matter set up in the answer amounts to a complete defense to the suit, it is not necessary to traverse any of the allegations of the petition.

Error to St. Louis Circuit Court.

W. H. H. Russell, for Plaintiff in Error.

Kortzenborfer v. The City of St. Louis.

The answer must specifically and separately deny the matters intended to be put in issue. (*Dare vs. Pacific R. R.*, 31 Mo., 480; W. S., 1015.)

A defendant cannot have two answers pending in the same case, one principal and the other supplementary. (*Nedvidek vs. Myers*, 46 Mo., 600.)

E. P. McCarty, for Defendant in Error.

I. The Statute contemplates the possibility of a supplemental answer as distinguished from an amendment, and if supplementary there must remain something to which it is a supplement. (W. S., 1035, § 10.)

II. The supplemental answer by itself constitutes a perfect defense to the plaintiff's suit.

ADAMS, Judge, delivered the opinion of the court.

This case is here on a demurrer to the defendant's answer which was overruled at Special Term and this judgment affirmed at General Term.

The action was for the amount of compensation for a lot which the City of St. Louis had proceeded to condemn for a public street, and the amount assessed, being \$4,600.00, was placed in the Treasury, and a warrant drawn on this fund in favor of the plaintiff. The city refused to pay the warrant, and this suit was brought to enforce the collection.

The defendant first filed an original answer, denying all the allegations of plaintiff's petition, and alleging that one Williams claimed to be the owner of the lot and claimed the compensation money as his, and asked that he might be made a party for the purpose of interpleading so that the defendant might know to whom the money might be paid with safety.

At a subsequent term of the Court the defendant filed what is called a supplemental answer, alleging in substance, that since the commencement of this suit Williams had obtained a decree for the title to said lot to be vested in him on the payment of \$1,000.00 in gold, to be deposited with the clerk for the plaintiff, and that the plaintiff had in fact received the \$1,000.00 so deposited. To this supplemental answer the demurrer referred to was filed.

It is urged here that this answer forms no defense to the plaintiff's petition, because all the facts in the plaintiff's petition are not denied.

The law is, that any amendatory or supplemental answer must be complete of itself, and that when it is filed it amounts to an abandonment of any or all previous answers. It is not, however, necessary to constitute a complete defense to plaintiff's petition, that all the material allegations should be controverted. It is sufficient that the amendatory answer relied on sets up new matter constituting a bar to the plaintiff's claim. All material allegations in the petition not denied by such answer for the purposes of the pending case must be taken as true. Conceding this to be so, did the new matter relied on in the supplemental answer, bar the plaintiff's claim to the compensation for the condemned lot?

Although when there is sufficient security of the compensation for condemned property, it may be said, that the owner is entitled to recover of the city the amount of such compensation, and the city is entitled to the property; yet until the compensation is actually paid, a complete title does not pass.

So when the plaintiff's title to the lot was decreed to Williams, the proceedings for condemnation were still *in fieri*, that is to say, the condemnation money had not been paid, and it took the place of the lot, and became the property of Williams to be paid to him instead of the plaintiff.

The supplemental answer without any reference to the original answer, in my judgment fully states this defense, and as it was a complete defense of itself, it was not necessary in that there should also have been a denial of any of the material allegations in the petition.

Judgment affirmed. The other Judges concur

Fourth National Bank of St. Louis, v. Heuschen, et al.

FOURTH NATIONAL BANK OF ST. LOUIS, Respondent, vs. FRED-
ERICK W. HEUSCHEN, *et al.*, Appellants.

1. *Bills of Exchange and Promissory Notes—Protest—Indorsers—Due diligence—Questions of Law and of Fact.*—When the facts are agreed on, due diligence in making a demand of payment is a question of law; when the facts are not agreed on, it is a mixed question of law and fact.
2. *Bills of Exchange and Promissory Notes—Protest—Partnership, dissolution of—Notice.*—A partnership, though dissolved, is still in existence so far as the question of demand and protest of their negotiable paper, and notice thereof is concerned; and a demand made on one of the partners, or made at a place which one of the partners said was their place of business, is good.

Appeal from St. Louis Circuit Court.

Hitchcock, Lubke and Player, for Appellants.

"Service of notice of protest by a notary through the hands of a clerk," without stating the nature of that notice, and especially that the indorser is looked to for payment, is *not* "sufficient to charge the indorsers." (34 Mo., 575). If the makers of the note had changed or given up their places of business, a demand at their old place of business or late place of business would be insufficient. (McGruder vs. Bank, 9 Wheat., 598; Anderson vs. Drake, 14 Johns., 114; Reid vs. Morrison, 2 Watts & Serg., 401.)

Finkelnburg and Rassieur, for Respondent.

Actual demand is not necessary in all cases, but there must be proof of either an actual demand or of due diligence, and the latter is sufficient to hold the indorser. (Parsons on Bills, Vol. 1, pp. 443 and 457; Story on Notes, § 264; Holtz vs. Boppe, 37 N. Y., 634; Plahto vs. Patchin, 26 Mo., 390; Rawdon vs. Redfield, 2 Sand., 178.) The notary may act upon the best information he can get, although it be uncertain. (Harris vs. Robinson, 4 How. U. S., 346; Bartlett vs. Isbell, 31 Conn., 296.)

What is due diligence is a question of law, to be fixed by an instruction of the Court upon the circumstances of each case. (Linville vs. Welch, 29 Mo., 203; Bank of Columbia vs. Lawrence, 1 Peters, 578; Harris vs. Robinson, 4 How. U. S. 336; Ransom vs. Mack, 2 Hill, 587.)

If a firm has dissolved and has no place of business as a

firm, then a demand at the place of business of either one of the partners is sufficient. (Story on Notes, § 239.)

A demand upon either partner in person is sufficient. (Story on Notes, § 239.)

ADAMS, Judge, delivered the opinion of the court.

This was an action on a negotiable promissory note, by the plaintiffs, as holders for value before maturity, against the makers and indorsers.

The note was made by a partnership composed of the defendants, Frederick W. Heuschen, Frederick Krite and Frederick Perschbacker, whose firm name was "Heuschen, Krite & Co." It was executed to the defendant, John H. Schaales, who indorsed the same to Wilhelm Rieke, and Rieke to the defendant, Frederick W. Heuschen, and he to the plaintiff.

At the close of the evidence the plaintiff asked the following instructions, which were refused by the Court and exceptions duly saved:

"1. The Court declares the law to be that service of notice of protest by a notary, through the hands of a clerk, is sufficient to charge the indorsers, and the notarial certificate verified by affidavit is evidence of such service."

"2. If the Court, sitting as a jury, believe from the evidence that at the maturity of the note it was placed in the hands of a notary public who during business hours of that day presented the same for payment at a place of business bearing the sign of Heuschen, Krite & Co., a place where said firm had been doing business for several years and which a person in charge thereof then and there represented as the place of business of Heuschen, Krite & Co., to which place plaintiff had been directed by one of the partners as their place of business about ten days previously, and which the same partner designated to the notary as their place of business on the day of maturity, and that furthermore said notary presented said note for payment to F. W. Heuschen, a member of said firm, in person on the same day, then there was sufficient demand to charge the indorsers although the Court may believe that a dissolution of said firm had in fact taken place previous to the maturity of said note."

The Court then at the instance of the defendants and against the objections of the plaintiff gave the following declaration.

"If the makers of the note sued on in this cause had a place of business in the city of St. Louis, but the individuals, or either of them, composing the firm of Heuschen, Krite & Co., resided in the said city of St. Louis, it was the duty of the notary to demand payment of said note of the makers thereof or either of said makers or at their place of residence or the place of business of any one of them."

The case had been submitted for trial to the court sitting as a jury, and when the Court refused the plaintiff's instructions and allowed those of defendants, the plaintiff took a non-suit and by leave moved to set it aside, which motion being overruled he appealed to general terms when the judgment at special term was reversed and the cause remanded, and the defendants have appealed to this Court.

On the trial at special term the plaintiff gave evidence tending to prove the facts as set forth in the second instruction, but failed to give any evidence in regard to the notice by the notary's clerk, and it will be unnecessary to pass upon the plaintiff's first instruction. The bill of exceptions shows that there were two similar cases tried by the court at the same time and the first instruction may have had reference to the other case.

The indorsers of a negotiable note are only liable in case due diligence has been used to make a demand of payment from the makers and due notice given to them in case the note is dishonored.

Where the facts are agreed on, due diligence in making a demand is a question of law; but when the facts are not agreed on, the question of due diligence becomes a mixed question of law and fact. That is, the jury are to find the facts and the Court is to pronounce the law upon the facts as they may be found by the jury. The usual way is to state in the instruction hypothetically the facts to be found from the evidence by the jury, and to pronounce upon those facts so to

be found, the conclusion of law resulting therefrom. This mode was pursued in the second instruction asked by the plaintiff. The evidence strongly tended to prove the facts as hypothetically put in that instruction. Those facts, if found to be true, in my judgment, as a matter of law, constituted due diligence in making a demand of payment on the makers of the note so as to fix their responsibility so far as such demand was necessary. A personal demand of payment on one of the parties was sufficient, although such demand may have been made after the dissolution of the firm; or a demand made in good faith at the late place of business of such firm, made on information, whether true or false, received from a member of the firm that such place was the proper place to make the demand, would constitute due diligence. A partnership, although dissolved, must be treated as still in existence so far as the question of demand, protest and notice is concerned, and the acts of one partner in such case must be considered as binding on all the others. Therefore the facts indicated in plaintiff's second instruction constituted not simply due, but extraordinary diligence in making demand of payment of the makers of the note.

The instructions given at the instance of the defendants did not cover the whole case as made by the plaintiff. The plaintiff had the right to have his case as made by the evidence presented by a proper instruction.

The judgment at General Term will therefore be affirmed. The other Judges concur.

—o—

WM. O'REILLY, Appellant, *vs.* ELLSWORTH MILLER, Respondent.

1. *Trusts and Trustees—Deed of Trust, sale under—Injunction—Damages, release of—Cestui que trust.*—In a suit for damages on an injunction bond, given to prevent the sale of land under a deed of trust, the cestui que trust is the only person damaged by the injunction, and he alone can execute a release for the damages.

O'Reilly v. Miller.

*Appeal from St. Louis Circuit Court.**H. A. Clover*, for Appellant.*Bakewell & Farish*, for Respondent.

The beneficiary was not a necessary party defendant to the injunction suit; the trustee fully represented him and had power to enforce any claim for damage. (*Ashton vs. Atlantic Bank*, 3 Allen, 217; *N. J. Franklinite Co. vs. Ames*, 1 Beasley, 507; *Shaw vs. Norfolk Co. R. Rd.*, 5 Gray, 170, 171.)

If the release be made by the trustee or other party having the legal interest, it can be set aside if to the prejudice of the party beneficially interested and made without his consent. (2 Parsons Cont., p. 123, note t, and p. 221 and note; 1 Parsons Cont., 22 and note.)

ADAMS, Judge, delivered the opinion of the court.

The facts of this case as presented by the record are, that the defendant, Miller, was trustee in a deed of trust to secure the payment of several promissory notes, of which Frederick Saugrain was the holder as assignee thereof. The deed of trust covered lots of ground in the city of St. Louis, and was executed by the plaintiff, O'Reilly, who had given the notes.

Saugrain, the beneficiary, had caused the trustee, Miller, to advertise the lots for sale to pay the notes, and this suit was commenced to restrain the proceedings of the trustee and to enjoin the collection of the notes in that way, on the alleged ground that the notes had been paid off. A temporary injunction was awarded, and the usual injunction bond executed. On the trial of the case the injunction was dissolved, and thereupon, in the name of Miller, the trustee, the beneficiary filed a motion to have the damages assessed growing out of the injunction. On the trial of this motion evidence was given of the damages sustained by Saugrain the beneficiary, and the proof showed that he had sustained damages to the amount of \$114.00 by reason of the injunction, and thereupon plaintiff read in evidence a release which had been given by the trustee, Miller, for all damages occasioned by the injunction; which release had been given without the consent of

Saugrain, the beneficiary, and for the consideration of ten dollars. The case being submitted without a jury, the Court disregarded this release and assessed the damages at \$114.00, and gave judgment for that amount on the injunction bond against the plaintiff and his sureties. After an ineffectual motion for a new trial by the plaintiff and his sureties, they have brought the case here by appeal from the judgment of the general term affirming the special term.

Although the beneficiary was not on the record as a party, the proceedings and evidence show that the defense of the injunction suit was for his benefit alone and carried on at his expense. The truth is, that the damages sustained by means of the injunction really belonged to the beneficiary as an incident to his debt, and the trustee had no interest in them any more than he had in the notes secured by the trust. He was a mere naked trustee holding the legal title for the purposes of the trust, and he had no authority in a proceeding like this to release the debt or the incidents.

The fact that the suit was defended in his name gave him no authority to release the beneficiary's interests without his consent. The beneficiary might have been made a party defendant, but the omission to do so ought not to deprive him of any of his rights under the deed of trust, or of any damages suffered by him by reason of the injunction.

Our Statute concerning mortgages and deeds of trust (2 W. S., 956, § 14,) has wisely provided, that a trustee cannot enter satisfaction of or release a deed of trust without joining with the beneficiary. Whether this statutory provision covers the case under review, it is unnecessary to decide. It is sufficient that the record shows that the suit was defended for the beneficiary alone, and not for the trustee, and this fact was known to the party who procured the release and therefore it is inoperative as to the beneficiary, and as his rights alone were affected by the release, the Court very properly disregarded it in assessing and rendering judgment for the damages.

Judgment affirmed. The other Judges concur.

Chisholm v. Nat. Capitol Life Ins. Co.

HARRIET O. CHISHOLM, Respondrix, *vs.* NAT. CAPITOL LIFE
Ins. Co., Appellant.

1. *Insurance—Policies—Consideration—Contracts of marriage.*—A woman engaged to be married to a man, has an insurable interest in his life.

Appeal from St. Louis Circuit Court.

Henderschott and Chandler, for Appellant.

A life policy is not one of indemnity. (*Dally vs. The India and Life Assurance Company*, 15 Com. Bench., 364.)

The act of 4, Geo. III, Chap. 48 is declaratory of the Common Law. (*Bunyon on Life Ins.*, 19; *Ruse vs. Mutual Benefit*, 1 Bigelow, 472.

The plaintiff had no insurable interest in the life of Clark. All of the American cases agree that there must be some interest.

The following cases show a direct pecuniary interest. *Mutual Life Ins. Co. vs. Johnston*, 1 Bigelow, 327; *Hoyt vs. N. Y. Life Ins. Co.*, Id., 497; *Am. Life Ins. Co. vs. Robert Shaw*, Id., 665; *Rawls vs. American Life Ins. Co.*, Id., 549; *Bevin vs. Conn. Mut.*, Id., 19; *Miller vs. Eagle Life Ins. Co.*, Id., 375; *Mitchell vs. Mut. Life Ins. Co.*, Id., 137; *McKee vs. Phoenix Ins. Co.*, 28 Mo., 385; *Loomis vs. Eagle Life Ins. Co.*, Id., 175; *Mitchell vs. Union Life Ins. Co.*, Id., 137; *Patton vs. National Loan Fund Ins. Society*, 1 Bigelow, 409; *Mutual Life Ins. Co. of N. Y., vs. Wager*, Bigelow, 483.

Isaac T. Wise, for Respondent.

I. There is no statute in this State touching this contract, and therefore this is a contract at common law and valid. (*Bunyon on Life Insurance*, 18, note b., *Id.* 21, § 6; *Lord vs. Dall*, (12 Mass., 115); *Bigelow's Life and Accident Reports*, 1 Vol. 154, 328, 374; *Miller vs. E. G. and H. Co.*, 2 E. D. Smith, 290; *Trenton Life, &c. vs. Johnson*, 4 Zabriskie, 576; *Shannon vs. Nugent*, *Hayes' Irish Rep.*, 537; *Dalby vs. India and London Life Ins. Co.* 28; *English Law and Eq.*, 28 312; *Campbell vs. N. E. Life*, 98 Mass., 381.)

II. Even if an insurable interest was a necessary pre-requisite

to the validity of the contract, the matrimonial contract between plaintiff and the person insured, was amply sufficient.

The certainty or probability, direct or incidental, of pecuniary benefit to the living, or pecuniary loss or damage to any one by the death of another, gives an insurable interest. (Phillips on Ins. C. 3, § XIV; Phila. Life Co. vs. Amer. Life Co., 23 Penn. St., 65; Loomis vs. Eagle Life, 1 Bigelow, 175; McKee vs. Phoenix Ins. Co., 28 Mo., 384; Miller vs. Eagle, Life Ins. Co., 1 Bigelow, 394.)

WAGNER, Judge, delivered the opinion of the court.

The main error assigned and relied upon for the reversal of this case, is the action of the court in refusing to declare that the plaintiff had no such insurable interest in the life of the person insured, as would entitle her to recover.

The record shows that there was a contract of marriage existing between plaintiff and Robert Peel Clark, and that on the 17th day of July, 1869, the defendant made and delivered to plaintiff its policy of insurance whereby it insured the life of the said Clark for the term of his natural life, for the sum of five thousand dollars. The policy was issued and delivered to plaintiff and made payable to her as the intended wife of Clark, she paying the annual premium of ninety dollars and twenty cents. The first premium was duly paid by her, and on the 12th day of January, 1870, whilst the policy was in full force, but before the contemplated marriage had been solemnized, Clark died.

What interest or whether any is necessary in the life of the person insured to support the contract of insurance is left in some confusion by the adjudged cases, as the authorities are contradictory. The leading case of Godsall vs. Bolden, (9 East, 72) was decided on the principle that a contract of life insurance was simply a contract of indemnity, not only requiring an interest in the assured, in order to give it a validity at its inception, but continuing good only so far as it was rendered so by the permanence of such interest. But that case was generally received with great dissatisfaction, and the insurance offices seldom availed themselves of the decision, as

they found it very injurious to their interests to do so. They usually paid the amounts of their life insurances, and the decision was practically disregarded. But the same question was subsequently taken to the Exchequer Chamber on Error in the case of *Dalby vs. The India and London Life Assurance Co.*, (15 Com. Bench, 364,) and *Godsall vs. Bolden*, was directly overruled.

There it was held, that the contract of life assurance was not one of indemnity, but a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of certain annual premiums during his life. An insurance on life has in fact very little resemblance to a fire or marine insurance. In a fire or marine insurance the particular object is to indemnify against a pecuniary loss, and the event upon which the money is made payable is the happening of the loss, the terms of the contract being to pay whatever is lost, not exceeding a specified amount. But a life insurance is a valued policy and a contract to pay a certain definite sum on the happening of a particular event, which may or may not occasion a pecuniary loss. In England there is a statute (4 Geo. III., ch. 48,) which enacts in express terms, that no insurance shall be made on the life of any person, wherein the person for whose use such policy shall be made shall have no interest, and that in all cases where the insured hath interest in the life, no greater sum shall be recovered or received from the insurers, than the amount or value of the interest of the insured during such life. But this statute does not extend to Ireland, and the courts of that country have held in a number of cases, that at the common law, policies of insurance are valid without any interest. (*Bunyon on Life Ass.*, p. 11; *Shannon vs. Nugent*, 1 Hayes, 536; *Fergusen vs. Lomax*, 2 Dru. and War., 120; *Scott vs. Roose*, Long and Town, 54; *Brit. Ins.Co. vs. Magee, Cooke & Co.*, [Irish Rep.] 182.)

In this State we have no statute on the subject covering this case, and as the policy is not void by the common law, it can only be declared so on the ground that it is against public

policy. There is nothing to show, that the contract was a mere wagering one, or that it is in any wise against or contrary to public policy. In *McKee vs. The Phoenix Ins. Co.*, (28 Mo., 383,) it was held that where the life of a husband was insured for the benefit of the wife, the policy was not necessarily determined by the wife's obtaining a divorce from the husband, that she might still have an insurable interest in the life of the divorced husband, that would support the policy. In *Low vs. Dall*, (12 Mass., 115,) the plaintiff was a young female without property, and had been for several years supported and educated at the expense of her brother, who stood toward her in the attitude of a parent. He effected a life policy for her benefit, and it was decided that she had an insurable interest in his life. Parker, C. J., who wrote the opinion of the court, said: "But it is said the interest must be a pecuniary legal interest, to make the contract valid, one that can be noticed and protected by the law; such as the interest which a creditor has in the life of his debtor, a child in that of his parent, &c. The former case indeed of the creditor, would leave no room for doubt. But with respect to a child, for whose benefit a policy may be effected on the life of a parent, the interest, except the insurable one which may result from the legal obligation of the parent to save the child from public charity, is as precarious, as that of a sister in the life of an affectionate brother. For if the brother may withdraw all support, so may the father except as above stated. And yet a policy effected by a child upon the life of a father, who depended on some fund terminable by his death to support the child, would never be questioned, although much more should be secured than the legal interest, which the child had in the protection of his father. Indeed we are all satisfied, that the interest of plaintiff in the life of her brother is of a nature to entitle her to insure it. Nor can it be easily discerned, why the underwriters should make this a question after a loss has taken place, when it does not appear that any doubts existed when the contract was made, although the same subject was then in their contemplation."

This case establishes the principle, that an uncertain interest in the life of the person insured is sufficient to support and uphold a policy in favor of another for whose benefit it was taken. The brother supported and educated the sister, but he was under no legal obligations to do so, and he might have withdrawn that support at any time.

In a well considered case, (*The Trenton Mut. Life and Fire Ins. Co. vs. Johnson*, 4 Zab., 576) the point has been directly decided, that it is not necessary for the plaintiff to prove an insurable interest in the life insured, and that if any interest were necessary, it need not be such as to constitute any direct claim upon the insured, but it would be sufficient if any indirect advantage might result from the life.

There was no statute in New Jersey when this decision was made, prohibiting such insurances, nor is there any here. The insurance was not a mere wagering contract and therefore cannot be said to contravene any principle of public policy. The plaintiff had an interest in the life of Clark, a valid contract of marriage was subsisting between them. Had he lived and violated the contract she would have had her action for damages. Had he observed and kept the same, then as his wife she would have been entitled to support. In my opinion she had such an interest as was entirely sufficient to render the contract valid. The defense in this case is devoid of merit, and is not creditable to the defendant making it. There is no pretense that there was any concealment of facts at the time of making the contract. Upon the facts there was no hesitation in entering into the agreement and obtaining the premium and issuing the policy. Had the defendant been as willing to observe and fulfill its obligations as it was to receive premiums, then this case would have never occupied the time of the courts.

The judgment should be affirmed, all the Judges concurring.

Petition of Powers, Killcullen, et al.

IN MATTER OF PETITION OF WM. POWERS, B. B. KILLCULLEN,
et al., Appellants.

1. *Taxes for schools—County Courts—Correction of assessments.*—County Courts have no power to alter the assessment of taxes to build school-houses, merely on the alleged ground that the school-house was unnecessary; the decision of that question is left to the local directors.

Appeal from St. Louis Circuit Court.

Bakewell & Farish, for Appellants.

T. G. C. Davis & Clopton, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The petitioners presented their application to the County Court of St. Louis county, praying to be relieved from an alleged erroneous assessment made by the local directors of the sub-district of which they were inhabitants, for the erection of a school house.

The County Court dismissed the case on the ground that it possessed no jurisdiction over the same, and its judgment was affirmed in the Circuit Court.

The main ground stated in the petition is, that the erection of a new school house was unnecessary, but it nowhere appears that the local directors exceeded their powers. The school law provides, that the local directors shall have power to erect, when they deem it necessary, a suitable school house in their sub-district, returning an estimate for this purpose to the township clerk, which shall be assessed upon and collected from taxable property in said sub-district in the same manner as other estimates for school purposes, but no estimates for building purposes shall exceed two per cent. of said taxable property, unless a greater per cent. shall be ordered by a majority of the voters of such sub-district present and voting at such meeting. (2 W. S., 1243, § 6, 1870.) There was no meeting of the voters authorizing the act, and no such meeting was necessary, as it is not pretended that the estimates amounted to two per cent. of the taxable property.

There are two provisions in the law, and two only, investing the County Court with jurisdiction over the matter of er-

roneous assessments. The first is in regard to the assessment of property for revenue (2 W. S., 1174, § 51, Ed. of 1870,) and declares, that the County Court of each county may hear and determine allegations of erroneous assessment, or mistakes or defects in the description or quality of lands, at any term of the court before the taxes shall be paid, on application of any person or persons who shall by affidavit show good cause for not having attended the County Board of Equalization (Court of Appeals) for the purpose of correcting such error, or defects or mistakes.

The other section on the subject (2 W. S., 1193, § 61,) relates to the collection of revenue, and provides, that the several County Courts are authorized and empowered to hear and determine all allegations of erroneous assessment of lands for taxes, and in all cases when it shall appear that lands have been erroneously taxed, either by having them taxed to more persons than one, or more than once for the same year to the same person, or if the land was not subject to taxation, the Court shall order the same to be corrected on the books of the proper assessor, and shall cause the clerk to make the corrections on the books in his office.

There is nothing in this case to bring it within either of the above quoted sections. There was no excess of power on the part of the local directors, nor any mistake or defects in the description or quality of the lands assessed, nor were the lands erroneously taxed, either by having them taxed to more persons than one, or more than once for the same year to the same person, and it is not contended that they were not subject to taxation. These are the only cases in which the County Court has any power or jurisdiction to hear and determine questions arising out of erroneous assessments or erroneous taxation; it is therefore manifest that the court had no jurisdiction of the subject matter, and the judgment below was correct and should be affirmed.

Judgment affirmed. The other Judges concur.

HENRY WESTHUS, Respondent, *vs.* FRANK H. SPRINGMEYER,
et al., Appellants.

1. *Practice, civil—Trial—Instructions—Answer—Mechanic's lien.*—Instructions in a trial in a mechanic's lien suit, alleging that the work was done under two contracts, and that the first is barred, although the answer had admitted that all the work was done under one contract, are inadmissible.

Appeal from St. Louis Circuit Court.

Hitchcock, Lubke and Player, for Appellants.

The plaintiff in his petition declared upon two distinct contracts, one being express and the other implied.

The express contract (the item of \$371.) was done more than four months before the filing of the lien, and the plaintiff could not have a lien for that item. (See *Livermore vs. Wright*, 33 Mo., 31.)

Finkelnburg and Rassieur, for Respondent.

The pleadings in the cause, admit that the demand of plaintiff arose out of but one contract.

ADAMS, Judge, delivered the opinion of the court.

This was an action by the plaintiff as sub-contractor, on a mechanic's lien. The petition alleges that the plaintiff agreed with the original contractor to do all the painting, glazing, and furnish all the materials necessary thereto, on a house for defendant Boehmen; for certain specified items of said work, he was to be paid three hundred and seventy-one dollars, and for the remainder, being extra work performed in completion of the contract, he would charge reasonable prices, making a total of \$413.50. That he completed the work under the contract on the 12th of September, 1870, and within four months thereafter filed his lien, &c.

The answer denies that the work was completed within four months before the filing of the lien, and denies that the lien contained a true statement of the account, &c., and sets up the further defense that the contractor had given his note to the plaintiff, which had been taken in full satisfaction of the debt.

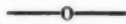
The plaintiff replied, denying the new matter, and denying that the note was taken in satisfaction, and offered to deliver up the note.

Upon the trial the plaintiff gave evidence conducing to prove this case in all particulars. The defendants claimed that there were two contracts, one for the \$371 dollars, and another for the extra work, and that the work for the \$371 having been furnished more than four months before the filing of the lien was not covered by the lien, and the defendants asked instructions presenting this view of the case, which were refused. The instructions were properly refused. The answer admitted that the work was all done under one contract, and there was no ground upon which to base the instruction.

This point seems to have been an after-thought not raised by the pleadings, and yet it appears to have been the main ground relied on at the trial, and still there was no proof of two independent contracts.

The case seems to have been fairly put to the jury by the instructions, and the verdict and judgment were for the right party, and I see no error in the record.

Judgment affirmed. Judge Sherwood absent. The other Judges concur.



GOTTLIEB EYERMAN, Respondent, *vs.* JOHN SHEEHAN, *et al.*,
Appellants.

1. *Evidence—Witnesses—Opinions, when admissible.*—Opinions of witnesses are admissible, when the subject of inquiry is so indefinite and general in its nature as not to be susceptible of direct proof, or if the witness has had the means of personal observation, and the facts and circumstances upon which he bases his conclusion are incapable of being detailed so intelligibly as to enable any one but the observer himself to form an intelligent conclusion from them.

Appeal from St. Louis Circuit Court.

Davis, Thoroughman & Jones, for Appellant.

Witnesses must give facts and not opinions. (*Dickinson vs.*

Johnson, 24 Ark., 251.) The exceptions to the rule are confined to cases where from the nature of the subject of inquiry, facts disconnected from opinions cannot be so presented to the jury as to enable them to pass upon the question presented with the requisite knowledge and judgment. (Newmark vs. Liverpool Fire Insurance Co., 30 Mo., 160.)

The opinions of these witnesses were not receivable simply because they had seen the work at intervals while it was going on. (Robertson vs. Starke, 15 N. H., 109; New England Glass Co. vs. Lovel, 7 Cushing, Mass., 319; Newmark vs. Liverpool Fire Insurance Co., 30 Mo., 160.)

Henry D. Laughlin, for Respondent:

Estimates made by witnesses based upon actual observation and great familiarity with the work. (Fitzgerald vs. Hayward, 50 Mo. 516)

EWING, Judge, delivered the opinion of the court.

This was an action to recover a balance of \$1,959.40 for stone sold and delivered by the plaintiff to the defendants at the water-works reservoir on Compton Hill in St. Louis, an account of which is set forth in the petition.

The defendants in their answer deny that plaintiff delivered stone in the quantity or of the quality alleged in the petition. They allege that they made a contract with the plaintiff by which he agreed to deliver stone of a quality, quantity and of dimensions particularly set forth in the answer, and which should pass the inspection of the engineer. They allege a breach of this contract, and that they were compelled to expend large sums of money in preparing the stone furnished by the plaintiff, so as to fit it for the purpose intended. They set up, by way of counter-claim, an alleged indebtedness of plaintiff to them in a large sum of money for goods sold and delivered, and for material furnished.

The plaintiff in his reply denies the material allegations of the answer.

There was a verdict and judgment for plaintiff for \$2,027.20, which being affirmed at general term, the cause is brought to this court by appeal.

The ruling of the court assigned for error related to the admission of evidence, and the refusal to give the instructions asked by the defendants. The original contractors for the work on the reservoir, Murphy and Henderson, before completing it sub-let a part thereof, being the northern half, to the defendants, and the plaintiff, who had previously entered into a contract with M. and H. to furnish stone of the description and dimensions stated in the petition, commenced the performance of their agreement, and continued to furnish the materials after the transfer to the defendants as before.

The Court permitted several witnesses against the objection of the defendants, to give their estimate of the average depth or thickness of the broken stone used in said work.

It appears from the evidence preserved in the bill of exceptions, that all the witnesses who testified on this subject, were connected in some capacity or other with the work, even were actually engaged in superintending it, and directing the manner of its execution, and from personal supervision and observation, had ample data upon which to make their estimate.

Before giving their opinion they stated the fact, more or less specifically upon which it was based. The question was as to the quantity of the stone furnished, and as it could not be accurately measured after it was put down, (so one of the defendants testified,) the average amount could only be ascertained approximately by evidence of this character.

The general rule is, that witnesses must state facts, and not their individual opinion, but there are exceptions to the rule as well established as the rule itself. When the subject of inquiry is so indefinite and general in its nature, as not to be susceptible of direct proof, the opinions of witnesses are admissible. If the witness has had the means of personal observation, and the facts and circumstances upon which he bases this conclusion are incapable of being detailed so intelligibly as to enable any one but the observer himself to form an intelligent conclusion from them, he may *add* his opinion.

A witness who is such an expert, may state facts and give his estimate of the work upon the facts detailed. (*Fitzgerald vs. Hayward, et al.*, 50 Mo., 516.)

Riley et al. v. Kershan.

The instructions asked by the defendant were properly refused. They were based upon the assumption, that there was evidence before the jury tending to prove a special contract between the plaintiff and the defendant for a delivery of stone. After a careful examination of the bill of exceptions, I have been unable to see any evidence that would warrant the giving of the instructions.

In the testimony of the plaintiff which seems to be mainly relied on to show this, there is some allusion to an understanding as to the delivery of the stone, but it evidently refers to his understanding or agreement with Murphy and Henderson, for he states and reiterates the statement, that he never made any contract or had any understanding whatsoever at any time with the defendants.

Judgment affirmed. The other Judges concur, except Judge Sherwood, who is absent.

—o—

GEORGE W. RILEY AND PHOEBE A. RILEY, representatives of
WM. P. STEWART, Respondent, *vs.* ANDREW J. KERSHAW,
Appellants.

1. *Payments—Satisfaction—Part for all—Receipt.*—Payment of part of a debt or liquidated damages is not a payment of the whole debt, even when the creditor agrees to receive a part for the whole and executes a receipt for the whole, except in fair and well-understood compromises carried faithfully into effect, or if the payment is in any way more beneficial to the creditor than that prescribed in the contract.

Appeal from St. Louis Circuit Court.

Samuel N. Holliday, for Appellants.

I. A contract under seal may be waived by a parol agreement or the mode of the discharge of the obligations altered—more especially, if the parol agreement shall be executed. (*Monroe vs. Perkins*, 9 Pick., 298; *Lattimore vs. Harsen*, 14 Johns 330; *Dearborn vs. Cross*, 7 Cowen, 48; *Richardson vs. Cooper*, 25 Maine, 450.)

Riley et al. v. Kershan.

II. A debtor may be discharged from his debt without a technical release even on payment of a less sum than is due, by a parol agreement executed, &c. (*Silvers vs. Brittin*, 2 *Harrison* (N. J.), 275.)

III. A party accepting a sum properly tendered does thereby compromise his future claim to a large sum, if he takes the sum, offered "as all that was due." (*Sutton vs. Hawkins*, 8 *Carrington & Payne*, 259.)

Rankin and Hayden, for Respondent.

Payment of a smaller sum in discharge of a debt calling for a larger, is never good unless there is a new agreement with a new consideration to support it. (*Harriman vs. Same*, 12 *Gray*, 341; *Hern vs. Kiehl*, 38 *Pa. State*, 147; *James vs. Bullett*, 2 *Littell*, 51; *Fenwick vs. Phillips*, 3 *Metc. (Ky.)* 88; *Hall vs. Smith*, 15 *Iowa*, 584; 3 *Parsons on Contracts* 618, 686, (4th Ed.)

WAGNER, Judge, delivered the opinion of the court.

This was an action instituted to recover certain rents and taxes alleged to be due. The answer set up, by way of confession and avoidance, a new agreement between the plaintiff and defendant, by which, in consideration of the defendants' paying the rent monthly instead of quarterly as agreed upon in the original contract, a smaller sum was stipulated to be paid, and which was actually paid in full satisfaction and discharge of all the rents and taxes. The reply denied any such new agreement, and averred that the payments which were made by the month were not made by or under any such agreement, or any agreement that relieved defendant from his obligation to pay the rent reserved in the contract.

Upon the trial the evidence was contradictory, but under instructions from the court, the jury rendered a verdict for the defendant. The case was then taken to the General Term, where the judgment at Special Term was reversed and the cause remanded.

In the progress of the cause the court at the instance of the defendant instructed the jury, that if they believed from the

evidence that plaintiffs agreed to receive and did receive from the defendant a less sum than the rent mentioned in the lease, in full satisfaction of the rent mentioned, and also in full satisfaction of the taxes due under the lease, and that the sums so paid by the defendant and received by the plaintiff, were paid and received in full satisfaction of the rents and taxes sued for, then they should find for the defendant.

The established rule to be found in all the earlier cases is, that the payment of a part of a debt or of liquidated damages is no satisfaction of the whole debt, even when the creditor agrees to receive part for the whole, and gives a receipt for the whole demand. But this rule must be so far qualified, as not to include the common case of the payment of a debt by a fair and well-understood compromise carried faithfully into effect, even if there were no release under seal. Some exceptions to the rule have always been acknowledged, as, if part be paid before all is due or in any way more beneficial to the creditor than that prescribed by the contract. (2 Pars. on Cont. 5th Ed., 618.) These exceptions to the rule are all based upon the fact that there is a new consideration for the release of the whole debt. Hence, if payment be made in a manner collateral to the original obligation, as, if it be paid before the day, or be made by a stranger out of his money, or by the note of a third person, though a smaller sum is paid than the amount of the debt, yet such sum so received in discharge of the whole demand is a valid discharge of the whole. But giving a receipt in full of all demands, is not conclusive evidence of actual payment of such demands, as such receipts are always open to explanation, and may be controlled by oral evidence.

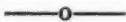
The instruction asserts the doctrine that a simple agreement accompanied by a reception of the money is a sufficient payment and discharge of the debt, though a less sum was received than the whole demand. The essential element of consideration is entirely ignored and it is for that reason erroneous. The declaration asked by the plaintiffs, asserting a counter proposition should have been given.

It has also been argued that improper evidence was admit-

Swainson, et al. v. Bishop.

ted, but as the objection to its introduction does not specify any reason upon which it was founded, we will not notice it.

The judgment at General Term must be affirmed. All the Judges concur, except Judge Ewing who did not sit.



JOHN SWAINSON, *et al.*, Respondents *vs.* DAVID H. BISHOP,
Appellant.

1. *Practice, civil—Circuit Court—Costs, security for—Time allowed.*—When by order of court a party is allowed a certain number of days wherein to file security for costs, such order refers to calendar days, and not days of the term of the court.

Appeal from St. Louis Circuit Court.

Slayback & Haeussler C. and O. Bishop, for Appellant.

The bond for costs may be filed in vacation, and has been even ordered to be filed in vacation. (*Brown vs. Ravenscroft*, 1 Mo., 397.)

M. Kinealy and R. S. MacDonald, for Respondents.

Both at Common Law and under the Code the days for filing motions for new trial or in arrest of judgment are judicial or sitting days of court. (*National Bank of &c., vs. Williams*, 46 Mo., 18; *Wash vs. Randolph*, 9 Mo., 142; *Hale vs. Owen*, 2 Salk., 625; *Long vs. Hughes*, 1 Duvall, (Ky.) 387.) And this court has declared that this is the rule in all cases in which papers have to be filed or in which the act is to be performed in court. (*Wash vs Randolph*, 9 Mo., 145.)

ADAMS, Judge, delivered the opinion of the court.

This was an action for false imprisonment brought to the June Term, 1871 of the St. Louis Circuit Court.

The defendant filed a motion to rule the plaintiffs to security for costs on the ground that they were insolvent and unable to pay them. This motion, by consent of parties, was

Swainson, et al. v. Bishop.

sustained on the 30th day of June, 1871, and the court made an order requiring security to be given in thirty days.

On the 4th of December, 1871, the court on motion of defendant dismissed the cause for the reason that the plaintiffs had failed to file security for costs, and the plaintiffs thereupon filed a motion to set aside the judgment of dismissal upon the alleged ground that the thirty days time given to file security had not elapsed; this motion was overruled and the plaintiffs appealed to general term where the judgment at special term was reversed, and from this judgment of reversal the defendant has appealed to this court.

The only point raised and discussed here is, that the thirty days time given to file security for costs, meant days in term whilst the court was in actual session, and that as a term of the court had lapsed, the thirty days allowed by the rule had not expired when the cause was dismissed.

The second section of the act concerning costs (W. S., 342,) in my judgment does not admit of this construction. The first section in regard to actions by non-residents, &c., requires security for costs to be filed with the clerk before the institution of the suit. The second section simply requires the undertaking to be filed without specifying how it shall be filed, whether in term time or with the clerk in vacation. The meaning of this is, that if the bond be filed in term, the filing must be indorsed on the paper and entered on the minutes, and if filed in vacation a simple indorsement on the paper to that effect by the clerk will be sufficient. This has been the universal practice so far as I know, and in regard to pleadings this mode is expressly recognized by the practice act. (See 27 W. S., 1018; Wash vs. Randolph, 9 Mo., 145.)

When the undertaking is presented, the clerk must file it; he has no discretion and merely acts in a ministerial capacity. If the security given proves to be insufficient, it would not be a compliance with the rule, and the court might on motion dismiss the cause for that reason.

Here the plaintiffs, as a matter of law and without offering to file security, demanded thirty days in term to comply with

Moran v. Lindell, et al.

the rule. In my opinion the court at special term very properly refused to comply with this demand.

The judgment of the general term is reversed. The other Judges concur.

—o—

JOHN MORAN, Respondent, *vs.* JEMIMA LINDELL, *et al.*, Appellants.

1. *St. Louis, city of—Ordinances—Improving streets—Charter.*—The City Council of St. Louis passed an ordinance directing the City Engineer to have a street graded, &c., according to law, and already an ordinance existed defining the manner of doing such work, &c. *Held*, that this ordinance is valid. [Sheehan vs. Gleeson, 46 Mo., 100, affirmed.]
2. *St. Louis, city of—Charter—Improving streets—Vicinity of the property.*—A property owner cannot refuse to pay the special tax for street improvements, because the centre of the street is improved, but the improvements do not extend to the sidewalk. The city authorities are the proper judges of how much it is necessary to do.

Appeal from St. Louis Circuit Court.

Wilbur F. Boyle, for Appellants.

I. When the ordinance 6,599, was passed, Grand Avenue had not been opened to the width of 120 feet as required by ordinance 6,126; and the charter prohibits the City Council from grading, paving or macadamizing any street or avenue "not established and opened according to law and ordinance." (Sess. Acts 1867, p. 71, Act 8, § 1; Dillon on Mun. Corp. p. 367.)

II. The charter required that the ordinance authorizing this work should prescribe the *extent, dimensions*, material and manner of doing it. (Sess. Acts 1867, p. 73, § 9; Murphy vs. Clemens, 43 Mo., 395; Haegele vs. Mallinicrodt, 46 Mo., 577; Schenectady vs. Schermerhorn, 6 N. Y., 92.)

III. The ordinance under which the contract purported to have been made was void, and the contract was therefore void *ab initio*, and no subsequent action of the Council could

give it validity. (Ruggles vs. Collier, 43 Mo., 353; Murphy vs. Clemens, 43 Mo., 395; Brady vs. The Mayor, &c., of N. Y., 20 N. Y., 312.)

IV. The charge made in the tax bill could not be supported by this contract, being for only a portion of the work called for by the contract. (McGrath vs. Clemens, 49 Mo., 552.)

V. The macadamizing sued for is 25 *feet distant* from the property sought to be charged, whereas it must be adjacent to, as well as in front of the property. (Sess. Acts 1867, p. 74. § 11; Philadelphia vs. Eastwick, 35 Penn. St., 75.)

VI. The City Council could not by ordinance, nor the City Engineer by parol agreement, modify or alter a contract already made and approved. The Council exhausted this power over the contract, when the contract was approved. (Dillon Mun. Corp., § 373; State vs. Barlow, 48 Mo., 17; Ruggles vs. Collier, 43 Mo., 353; Murphy vs. Clemens, 43 Mo., 395; McSpedon vs. Monroe, 7 Bosw., 601; Dey vs. Jersey City, 19 N. J. Eq., 412; Bank vs. Dandridge, 12 Wheat., 68-9; Fox vs. New Orleans, 12 La. Ann., 154; Robert G. Boneskeel vs. Mayor N. Y., 20 How. Pr. R., 237.)

Thomas Grace, for Respondent.

If the contractor submits to the action of the council, restricting the amount of work to be done under the contract, and voluntarily and by direction of ordinance, leaves undone those portions of the work which the council declare by ordinance cannot be done, that forms no ground of complaint on the part of appellants.

The same power that contracts may assent to, vary or modify the contract. (Messenger vs. City of Buffalo, 21 N. Y., 196.)

WAGNER, Judge, delivered the opinion of the court.

This was an action on a certified tax bill issued by the City Engineer of the City of St. Louis against the defendants, to defray the cost of macadamizing Grand Avenue in front of their property. The plaintiff had judgment in the court below and the defendants have appealed the case here.

It appears by the record, that on the 3rd day of July, 1868, the City Council passed an ordinance, numbered 6,599, directing the Engineer to cause Grand Avenue from Lindell Avenue to Kossuth Avenue to be graded, curbed, macadamized, etc., according to law.

Under this ordinance the work was let out and the plaintiff finally became the contractor. At the time the contract was made, Grand Avenue was of an irregular shape, being eighty feet wide in one section, one hundred feet wide in another section, and one hundred and twenty feet in another section, and Ordinance 6,126 had been passed, providing for widening the whole Avenue to the width of one hundred and twenty feet. But this Ordinance had not been carried into effect. Before the macadamizing was put upon the street, the City Council passed two other Ordinances: one 6,866, prescribing the manner in which the Avenue should be laid out differing from the ordinary method; and the other 6,902, amendatory of Ordinance 6,599, which provided, that inasmuch as the Avenue was not widened to its full extent as established by ordinance, that the Engineer should only grade the street, and cause the carriage ways twenty feet wide on each side to be macadamized.

It is first objected, that the contract was void because there was no ordinance in existence at the time, defining the dimensions and material and manner of doing the work. But this position cannot be maintained. The contract was made and entered into by the City Engineer, under the provisions of General Ordinance 5,399, which prescribes the manner of curbing and paving streets, and regulates the dimensions and size of the materials used. This question upon this ordinance was before this court in the case of Sheehan vs. Gleeson, (46 Mo., 100.) and it was held that the ordinance was a compliance with the charter, and gave the Engineer power to act.

As remarked in that case, the ordinance wants precision, and is not as full and complete as it should be, but it is not so absolutely uncertain as to justify this court in holding it invalid.

This charter provides, that it shall not be lawful for the City

Council to grade, pave or macadamize, any street or avenue, not established and opened according to law and ordinance, and as there was an ordinance establishing the width of the avenue at one hundred and twenty feet, and it had not been opened to that width, it is thence sought to draw the conclusion that there was no authority for macadamizing or doing any work upon the street, till that ordinance was fully carried out. But, it must be observed, this ordinance was modified or partially suspended by a subsequent one, and that left the street just as it existed before, and as it had been previously established and opened.

Although the contract was made whilst the ordinance was in force requiring the street to be opened one hundred and twenty feet wide, yet the work was not commenced under that ordinance, and when the action of the Council left the street in the condition that it had formerly existed, the contractor proceeded and assented to the modification, and I entertain no doubt about the validity of the contract.

It is further insisted, however, that because only a carriage-way on each side of the street was macadamized, and the material did not cover the whole street, and reach defendants' sidewalk, that therefore they are not bound.

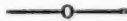
The charter declares that the cost of paving, macadamizing, guttering, &c., shall be paid by the owners of the property in the vicinity of the work. There is no positive requirement, that the improvement shall immediately join or connect with the property.

The case of Philadelphia vs. Eastwick, (35 Penn. St., 75,) cited and relied on by the defendants, does not support their views, and is not an authority for the doctrine contended for. In that case a railroad company located their railroad in the street, and used and occupied a strip of between 40 and 50 feet in breadth along the whole front of the defendants' lot. After the location of the road, the owner of the lot made a deed to the railroad company of this strip of ground. The work or improvement, for which it was attempted to charge the lot, was put upon the other side of the railroad track, and

the defendants had no access to the street in front of their lot except by crossing the strip of ground, used and owned by the railroad. As the property was separated from the highway by a strip of land owned and occupied by another, the court gave judgment for the defendants.

The facts presented here are wholly different. No land belonging to another intervenes between the defendants' property and the road, on which the work was put. But on the contrary the defendants own the fee up to where the macadamizing was done. That the work is not fully completed up to where the sidewalk should be, we do not think makes any difference. The city authorities were the proper judges of how much it was necessary to do.

Upon the whole record we have failed to find anything that would warrant an interference with the judgment. The other Judges concur.



JOHN POWERS, Assignee of JOHN STEINRAUF & BRO., Respondent, vs. JEMIMA LINDELL, *et al.*, Appellants.

1. Moran vs. Lindell, ante, p. 229 affirmed.

Appeal from St. Louis Circuit Court.

Wilbur F. Boyle, for Appellants. See brief in Moran vs. Lindell, ante.

Thos. Grace, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The facts in this case are similar in all respects to those presented in the case of Moran vs. Lindell, *et al.*, decided at the present term. In accordance with the views therein expressed the judgment will be affirmed.

The other Judges concur.

Keferstein, Assignee, v. Lenkton.

FREDERICK W. KEFERSTEIN, Assignee of GEORGE GABHART,
Respondent, *vs.* SARAH V. LANKTON, Appellant.

- * 1. *Statutes, construction of*—*Session Acts of 1867, p. 73*—*St. Louis, city of*—*Pavements—Reconstruction and repairs.*—*Session Acts of 1867, p. 73, § 10,* provides for the original construction, re-construction and repairs, of sidewalks in the City of St. Louis.

Appeal from St. Louis Circuit Court.

Jecko and Hospes, for Appellant.

If Sess. Act 1867, p. 56, is to be held to apply to this case, then this work (repairing) cannot be assessed as a special tax.

Thos. Grace, for Respondent, relied on Sess. Acts 1867, p. 73, § 10.

VORIES, Judge, delivered the opinion of the court.

This action was commenced before a Justice of the Peace in the month of August 1867, to recover the sum of \$16 80-100, the amount of a special tax bill charged against the defendant and certain property belonging to her in the tax bill described. The charges in the bill were for sidewalk paving in the vicinity of said property.

The action was brought under the provisions of the statute passed and approved March 13th, 1867, entitled "An act to revise the charter of the City of St. Louis" (Acts 1867, p. 56.) The act took effect from and after its passage.

The plaintiff recovered a judgment before the Justice, from which an appeal was taken to the St. Louis Circuit Court, where a judgment was again rendered against appellant, and from which she appealed to the General Term of said court, where appellant failed to file any statement of her case, as required by the rule of said court, for which reason the judgment was affirmed, from which last judgment an appeal was taken to this court.

The only question presented by the appellant for the consideration of this court, is, whether the act of 1867 referred to, is applicable to the cause of action sued on in this cause, or in other words, whether an action to recover for the work sued for can be maintained under the provisions of said act.

The appellant insists that the contract under which the work was done was made before the passage of said act; that the remedy that existed at the time of making the contract must be pursued in the collection of the tax to be assessed against appellant therefor; and second, that the work charged for was only for repairing the sidewalk, and that work done in repairing is not provided for in the act of 1867; that therefore, in order to enforce the payment for work done in repairing, resort must be had to the act of 1864, by which it was provided, that assessments for repairing should be collected as the taxes for the general government of the city are collected. (Acts 1864, p. 446.)

In reference to the first question presented, it will be seen by an examination of the contract under which the work was done, that it is dated on the 19th day of November, 1866, and by the terms of it the plaintiff in this suit undertook to do the paving and repairing of sidewalks, &c., in certain parts of the city until the first day of July 1867, when and where the City Engineer should direct it to be done; by the terms of the contract, no particular work is contracted for; the work to be done is to be afterwards directed and determined by the Engineer, so that the appellant is no party to the contract and cannot have any rights therein, and no obligations are imposed on her thereby. Her obligation to pay for the work only arises when the work is ordered to be done and is done in the vicinity of her property; if the work was not ordered to be done, and was not done, before the taking effect of the act of 1867, the collection of the tax assessed for the work will be governed by said act, unless the appellant's other ground of objection is well founded.

The tax bill upon which the suit was brought is dated in June 1867, long after the act of 1867 took effect, and there is no evidence to show at what time the work was done, or that tends to show that the work sued for was done before the taking effect of the act of 1867.

But appellant's counsel contends that the work sued for was done in repairing a sidewalk, and that repairing is not

named or provided for in act of 1867; but is provided for in the act of 1864.

The 10th section of the act of 1867, (Sess. Acts, p. 73,) provides, that "the cost of paving, macadamizing, guttering, cross-walks and curbing of the carriage ways, intersection and sidewalks of all streets, alleys and other highways, and such portion of wharves as may be provided by ordinance, and the cost of all *reconstruction*, and also the cost of grading and paving all alleys in the city, shall in all cases (except such as shall hereafter be provided, and as may be further provided by ordinance, &c.)"

The evidence shows that the work for which the bill was charged and assessed was patch-work or repairs, made with new bricks, the old bricks being taken away and new ones put down, and that only part of the sidewalk in front of appellant's property was removed and renewed. It seems to me that it would be very hard to determine whether this work was repairing, or whether it would come under the proper description of reconstruction. The distinction between the two is very nice and difficult to determine. I think however, that the Legislature intended to provide in the act of 1867 for the pavement done in the sidewalks of the city, whether the work was done in the original paving of the sidewalks, or in the reconstruction or repair thereof; that all such work may properly be classed under the head of paving the sidewalks of the city. It is the duty of the courts to carry out the plain intention of the Legislature.

The judgment of the Circuit Court must be affirmed. The other Judges concurring, the judgment is affirmed.

ROBERT A. OAKES, Respondent, *vs.* THE MOUND CITY MUTUAL LIFE INSURANCE COMPANY, OF ST. LOUIS, MO., Appellant.

1. *Practice, civil—Supreme Court—Evidence.*—In law cases this court will not weigh the evidence.

Appeal from St. Louis Circuit Court.

Bland & Baker, for Appellant.

Spencer & Hatch, for Respondent.

The verdict was that of a jury, on evidence properly before them, and this court will not disturb it.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a contract for a year's service as book-keeper, alleged to have been made by the defendant with the plaintiff on the 20th day of January, 1871, for the sum of \$2,000.00.

The service had already commenced on the first of January, 1871, when the contract was entered into. The plaintiff alleges that he was wrongfully and without any reasonable cause discharged, against his consent, in August, 1871, and claims damages for the balance of the contract price, asserting, that he was ready and willing to perform the contract on his part, and that he was without employment during the balance of the time.

The defendant justified upon the ground that the plaintiff proved to be wholly incompetent to discharge the duties of a book-keeper, and also denied that there was any contract for a definite term of service.

Each party gave evidence conducing to prove the issues on their respective parts. The court refused all instructions asked by the parties, but on its own motion gave instructions which seem to have fairly presented the case to the jury.

The jury found a verdict for the plaintiff, and a motion for a new trial was overruled and final judgment rendered on the verdict for plaintiff—which was affirmed at General Term, and an appeal taken by the defendant to this court.

There seems to be nothing in this case except a question in

Budd et al. v. Zoller.

regard to the weight of evidence, and we are asked to review the evidence,—both in regard to whether there was such a contract as was declared on, and as to whether the plaintiff was so incompetent as a book-keeper as to justify the defendant in discharging him.

Without going into the evidence on either point it is sufficient to say that we have examined it, and it seems to be contradictory, and the jury might have found either way ; but the Circuit Court having better opportunity than we can possibly have to sift the evidence, has ratified the finding of the jury, and we see no good reason for violating the well settled practice in this court by overruling this action of the Circuit Court.

Let the judgment be affirmed. Judge Wagner absent, the other Judges concur.

—0—

GEORGE K. BUDD, *et al.*, Respondents, *vs.* CHARLES ZOLLER
Appellant.

1. *Contracts—Commissions—Brokers.*—A. wishing to borrow money on some property applied to B., who agreed to find a lender, and to have the title examined, and would charge \$200, which would include the expenses of examining the title and his commission ; A. gave B. his title deeds at the time. A defect being found in the title the lender refused to loan the money, and B. sued A. for the \$200. *Held*, that B. should have first examined the title before applying for a loan, and was his agent for that purpose, as well as for procuring a loan, and was not entitled to his commissions.

PER EWING and WAGNER, Judges, dissenting.

2. *Contracts—Commissions—Brokers.*—A broker, employed to effect a loan, is entitled to his commission, when he has found a lender, who has the money and who approves of the security, unless his rights are varied by special contract. There is always an implied condition that the borrower will show a good title.

Appeal from St. Louis Circuit Court.

Wm. J. Reed, for Respondents.

Plaintiffs procured a party with the money in readiness and

willing to loan the same upon the property upon certain terms, to all of which defendant agreed, and delivered his title deeds to the agent of the lender for investigation. Here the undertaking of the brokers was accomplished and their commission earned. (*Barnard vs. Monnot*, Am. L. Reg., Vol. VI, 209; *Bailey vs. Chapman*, 41 Mo., 536.)

VORIES, Judge, delivered the opinion of the court.

This action was brought before a Justice of the Peace and was founded upon the following account: Charles Zoller, Dr., to Budd, Son & Co., a firm composed of George K. Budd and Charles P. Budd. For commission on loan of \$4000 (money obtained by said firm) commissions on same as per agreement 5 per cent., \$200.

A trial was had before the Justice and judgment recovered by plaintiff. An appeal was taken to the St. Louis Circuit Court, where judgment was again rendered for plaintiff, which being affirmed by said court at general term, the defendant appealed to this court.

The case was tried in the Circuit Court at special term by the court, a jury having been waived by the parties. It is shown by the evidence of the plaintiff and witnesses given at the trial, that one E. W. Paul is a broker in the City of St. Louis; that he had learned that defendant desired to borrow some money; that he called on the defendant, and that defendant told him that he wanted four thousand dollars, if he could get it on terms to suit him. Paul told him that he would charge him nine per cent. one off for commissions for making the loan. Paul asked defendant on what property he wanted it? He stated that it was on the Montgomery House on Broadway. Paul then told defendant, that if he wanted the money he must go to Budd, and make the arrangement with him. Defendant told Paul that he would get the title papers and hand them to him. Paul afterwards got the papers for the purpose of having the examination of the title made. Paul told defendant, that he did not know who Budd had as an examiner; told him to see Budd and he said he would do so.

Paul afterwards heard that Sterling had examined this title and reported it defective, and so told the defendant that Sterling had so reported, and told defendant that he could arrange it and that defendant said Sterling was mistaken. Witness thought defendant said he would fix it.

Paul told him to see Todd, that Todd would tell him; defendant said he would. On cross examination Paul stated that he had called on defendant at the market house to see him about the loan, that he told defendant that the arrangement would have to be made through Budd & Son, and referred defendant to them to make a bargain; that he had got the papers from defendant and handed them to plaintiffs, that he made no charge for commission; that he knew the Montgomery House; that defendant had been in possession of it for a long time; that the money never was loaned to the defendant.

Charles P. Budd was examined as a witness, and testified as follows: "I am one of the plaintiffs; our business is that of brokers, we procure loans for parties wishing to borrow. In May, 1869, E. W. Paul (last witness) informed us of an application for a loan from the defendant, that defendant wanted \$1,000 for five years, and that he would give as a security, a deed of trust on the property known as the Montgomery House property, at the corner of Broadway and —street. He handed us the title deeds for the purpose of having the title examined; Zoller, defendant, came to our office before we had the title investigated, and we had a conversation with him as to the terms on which we would procure the loan for him. I told him we would charge him two hundred dollars (\$200.00) for procuring the loan for him. This was to include the expense of the examination and every thing. We were to pay the expenses of the examination of the title; Zoller agreed to this; the money to be loaned was not ours; we were acting as brokers. We applied to the Connecticut Life Insurance Company, and the company placed to our credit for the purpose of this loan, the sum of four thousand dollars. This was placed to our credit conditionally to be drawn upon by us only in the event Albert Todd, upon whose report alone the company would loan,

would report favorably as to the title. The property offered was ample security, if the title was free from defect. Mr. Todd reported a defect in the title, and would not give a certificate if that defect was not removed. We afterwards sent for Zoller and told him that Todd reported a discrepancy in the title, also told him that the defect would have to be fixed before he could get the money. He said that it was a mistake, that his title was good, and he would go and see Todd about it. The defect never was removed, the money (\$4,000.00) was held by the company subject to our call for quite a while; but afterwards when it was apparent defendant would do nothing about the matter, the money was withdrawn. We did every thing we engaged to do. The Connecticut Mutual Life Insurance Company refused defendant the loan on account of the defect in the title; we had no interest in the money to be loaned.

The plaintiffs introduced oral evidence as well as abstracts of titles and a copy of a deed, all of which were objected to by the defendant, and his objections being overruled exceptions were taken. But said evidence need not be further noticed.

At the close of the evidence the court at the request of the plaintiffs gave a declaration of law declaring the law to be as follows:

The court declares the law to be, that if the defendant engaged the plaintiffs as brokers to procure for him a loan of \$4,000.00 upon certain real estate, agreeing to pay plaintiffs a commission for procuring the same, and further, if plaintiffs procured a lender with the money in readiness, who approved of the sufficiency of the security, then plaintiffs are entitled to recover of defendant his agreed commission, although the lender upon examination of the titles found the same defective and refused therefore to consummate the loan.

The defendant objected to this declaration of law, when his objection was considered and overruled and he excepted. After the court had found for plaintiffs and rendered a judgment against defendant, he in due time filed a motion for a new trial, setting forth as causes therefor the opinions of the court excepted to, as well as all the other reasons usually set forth.—

The court overruled this motion, when defendant again excepted. The question which it seems from the record in this case controlled the parties and the court upon the trial, and which is involved in the declaration of law as given by the court, is as to the proper construction of the contract upon which the suit is brought. If the contract should be construed to be a simple contract between plaintiffs and defendant, by which defendant employed the plaintiffs to procure a loan of four thousand dollars for him at a certain commission to be paid therefor, defendant promising on his part to give as security a deed of trust on certain property named, then in such case the plaintiffs would have a right to presume that the defendant was the owner of the lot offered as security; and if they went on in *good faith* and procured the money or negotiated the loan required; but the defendant's title to the land proving defective and loan failing of consummation, the plaintiffs would be entitled to their commission. Such a case would come within the principle decided in the case of *Bailey vs. Chapman*, (41 Mo., p. 536,) and cases there cited, and the declaration of law given by the court in this case, in such case might be proper. But that is not the case before us. Here one Paul, (who seems to be some way engaged for plaintiffs,) goes to the defendant to know if he wanted to borrow money. Defendant informs him that he would like to obtain the loan of four thousand dollars for five years; he informs Paul of the property he offers as security; furnishes him the title papers to the property, so that the title might be investigated. Paul tells him that he will have to get the plaintiffs to make the arrangement, which he promises to do. Paul took the title papers and gave them to plaintiffs and informed plaintiffs, that defendant wanted to procure the loan. After this the defendant called at the office of plaintiffs and there the agreement proved was made.

(The evidence has been set forth in full, that pertained to the contract, so that it will appear in full in the statement of the case.) It appears that the defendant called at the office of plaintiffs before any examination of his title to the lot had been made.

Plaintiffs told defendant that they would charge him two hundred dollars for procuring the loan for him, the two hundred dollars to include the expenses of the examination and everything; the plaintiffs agreed to pay the expenses of the examination of the title; to this proposition it seems that the defendant agreed. The plaintiffs, it seems, without examining the title applied to a Connecticut Insurance Company to get the loan of the money; this company agreed to furnish the money on the condition that Albert Todd, upon whose report alone the company would loan the money, should report favorably. Todd reported unfavorably and the company refused to furnish the money. This is the whole contract as proved in a condensed form. Now it will be seen by this contract, that the defendant had employed the plaintiffs not only to procure the loan, but to examine the title of the property and see if it was good and whether a loan could be procured upon it. It seems to me, that the plaintiffs in such case, ought to have first ascertained whether the title was good and then procured the loan, if the title proved good and sufficient. They were defendant's agents for both purposes, and in fact they having agreed to have the title examined, and having the title papers in their hands for that purpose they are to be charged with notice of the defect in the title before they procured the money, and it would be bad faith in them to charge the defendant commission for procuring money, when it was their duty to have known at the time that it would be unavailing. It seems that the money never was really obtained; it was only placed where the plaintiff's could obtain it on condition that Todd should report favorably on the title, a matter that the plaintiffs had obligated themselves to have attended to. It is impossible to believe after carefully looking at the contract as proved, that the defendant ever intended to bind himself to pay the two hundred dollars, unless the money could be obtained on the property with the title furnished. It is said, however, that by this construction of the contract you compel the plaintiffs to have the title examined, and if the loan is not perfected, they receive no pay for it. That may be, but it is their contract

and by giving the contract the construction contended for by the plaintiffs, you would put it in the power of the plaintiffs to charge the defendant for services which they knew at the time, or ought by his contract to have known, was useless.— With this construction of the contract it will appear that the declaration of law made by the court was improper, being predicated on an improper construction of the contract as proved and the judgment must therefore be reversed.

Judges Adams and Sherwood concurring, the judgment of the Circuit Court is reversed and the cause remanded.

Judges Ewing and Wagner dissent.

Dissenting opinion of Judge EWING, WAGNER Judge, concurring with him.

This action was commenced before a Justice of the Peace to recover commissions for procuring a loan of \$4,000 for defendant.

There was a judgment for plaintiffs before the Justice, and also on appeal to the Circuit Court, which being affirmed in General Term the cause is brought to this court by appeal. The evidence tended to prove, that the defendant, wishing to procure a loan on real estate in St. Louis, had an interview on the subject with one Paul, a broker, to whom he delivered a deed for the purpose of having the title investigated, but nothing being accomplished between these parties, Paul referred him to the plaintiffs who were engaged in that business, with whom negotiations were entered into, resulting in an agreement that plaintiffs would procure a loan for the sum named for five years for \$200, plaintiffs paying the expenses of investigating the title to the property offered as security. It appeared in evidence, that the plaintiffs applied to the Connecticut Life Ins. Co. for the money and the required amount was placed to their credit by the Company for the purpose, to be drawn upon in the event that Mr. Todd, the attorney of the Company, would report favorably as to the title; that the title papers which had been put in the hands of Paul, being turned over to plaintiffs, they caused an investigation of the title to be made by A. N. Sterling, an examiner of land titles

in St. Louis, an abstract of which he prepared, which being submitted to Mr. Todd, he pronounced the title defective; that defendant was informed of this objection to the title; and that it must be removed before the loan could be had; that defendant insisted that the title was good, and said he would see Mr. Todd; that the defect was never removed; that the money having been held by the Insurance Company sometime, subject to the call of plaintiffs, was finally withdrawn when it became apparent that defendant would not take the loan. A. N. Sterling, an examiner of titles, testified to having made the investigations at the request of plaintiffs, and prepared an abstract of the title, which contained an abstract of all the deeds on record affecting the title to said property, and that a certain deed from Wright to Olden, was a necessary link in defendant's chain of title to the property in question, and without it the title would not be good. This testimony was objected to on the ground of incompetency and irrelevancy, but the objection was overruled, and the defendant excepted. The abstract of title, and the deed from Wright and wife to Olden, were then read in evidence against the defendant's objections. The defendant asked an instruction in the nature of a demurrer to the evidence, which was refused, and he excepted. No evidence was offered on the part of defendant.

The Court at the instance of plaintiffs declared the law to be: That if the defendant engaged the plaintiffs as brokers to procure for him a loan of \$4,000, on certain real estate, agreeing to pay plaintiffs a commission for procuring the same; and further, if plaintiffs did procure a lender with the money in readiness, who approved of the sufficiency of the security, then plaintiffs are entitled to recover of the defendant his agreed commission, although the lender upon an examination of the title, found the same defective, and refused therefore to consummate the loan.

Where a broker is employed to procure a loan of money, there is always an implied obligation on his part to procure a person who is willing and ready to make the loan on security

that is adequate in value and the title to which is good. This done, his duty is performed, and he is entitled to his commissions whether the loan is consummated or not, unless his right to commission is by special agreement made to depend upon conditions which the law does not annex to his engagement as a broker. The principal cannot relieve himself from liability by a capricious refusal to effect the loan, or by a voluntary act of his own disabling him from performance. The authorities I have examined, agree substantially in recognizing this as the correct rule, both in respect to loans and sales of property. (See *Barnard vs. Monnot* 33 How. Pr., 440; *Glentworth vs. Luther*, 21 Barb., 145; *Corning vs. Calvert*, 2 Hilt., 56; *Moses vs. Bierling*, 31 N. Y., 462; *Koch vs. Emmerling*, 22 How., 69; *Keys vs. Johnson*, 68 Penn. St., 42; *Insley v. Jones*, Brightlys, N. P., 76; *Baily vs. Chapman*, 41 Mo., 536; *Kent and Obear vs. Allen*, 32 Mo., 87.) In *Holly vs. Gosling*, 3 E. D. Smith, 263, a case more directly in point than any I have ever seen, the defense to the action, plaintiffs being brokers, was, that the title was defective, and the lender for that reason withheld the loan. The answer of the Court to this, was that plaintiff having procured the loan, *i. e.*, found a lender who had the money ready, having procured a consent to the loan, and obtained an approval of the sufficiency of the security, he did all that was necessary to make his title to the commissions perfect, and all that his employment required and, adds the Judge, "it was no part of his undertaking or duty to remove incumbrances upon the premises proposed to be mortgaged, and if an incumbrance was found, or by reason of his failure to remove the incumbrance the lender refused to consummate the transaction by paying over the money, that was the defendant's fault, and furnished no defense to the plaintiff's claim for commissions. The broker assumes no obligations in reference to the title, no more in respect to loan, than sales. The borrower when employing a broker to procure a loan, does so, always upon the implied conditions that he will make or tender to the lender, a good title to the property offered as the security for the loan. And if upon pre-

senting such a title it is rejected, he is not responsible to the broker for commissions; but if the negotiations are made, and the sale is not effected in consequence of a defective title, then the broker is entitled to his commissions, the same as if he had consummated the sale.

Such are the obvious legal consequences of performance on the one part, and default on the other. An express stipulation that a defective title should not affect the claim for commissions in the case supposed, could add nothing to the legal obligation implied in the employment of a broker in respect to his right to compensation.

Applying these principles to the case under consideration, there can be no difficulty in arriving at a proper conclusion.

The evidence shows that the plaintiffs, pursuant to their agreement with Zoller, caused the title to be investigated by a competent examiner of titles, Mr. Sterling, the terms and conditions of the loan having been agreed on before the investigation was made, that the abstract of title being afterwards submitted to Mr. Todd, was pronounced defective, that defendant, though insisting that it was good, made no attempt to satisfy plaintiffs or Mr. Todd of that fact, or to furnish any evidence to that effect at the trial, and declined all inquiry as to the ground of such objection, or the nature of the defect. If the objection to the title was frivolous or groundless or was merely capricious, which we are certainly not warranted in *presuming*, it was for the defendant to show this by producing the necessary evidence of title. When the plaintiffs undertook under their agreement to have the title investigated, they adopted the usual course in employing a competent examiner for that purpose. The defendant never at any time pointed out any defect in the abstract or made any specific objection to it. Nor did he object to the person selected to make the examination, nor the manner in which it was done. The plaintiffs then having made out their case by proof of a contract with Zoller, and of performance on their part, they had nothing more to do. It did not devolve upon them to aid their adversary in establishing his defense, by adducing evi-

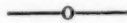
dence of the supposed unreasonableness of the objections made to the title by the lender or its attorney, Mr. Todd, notwithstanding the loan was to be made only in the event of Mr. Todd's approval of the title. Such an understanding did not affect the right of plaintiffs to their commissions, if they performed their agreement. The legal effect would not have been different, had the lender made this reservation of the right of approval directly to himself instead of an attorney. For the question at last is not whether objections were made, but was there a good title? If the title was good, the loan could not be declined by the lender as we have seen, without involving a forfeiture of the claim of the broker for commissions. As already indicated, it devolved upon the defendant to show that he tendered to the lender a good title to the property. This being implied in his engagement with the broker, he must show compliance in order to exonerate himself from liability for commissions.

The abstract of title read in evidence by the plaintiffs, was not admissible for the purpose of showing the nature and condition of the defendant's title or any particular defect in it. The title papers themselves were of course the best evidence and there was no foundation laid for the production of secondary evidence. So of the deed from Wright to Olden, which was read in evidence. This deed was one of a number of intermediate links in the chain of title as shown by the abstract. But it was only in this way that it appeared to be part of *defendant's* title, or had any connection with it, being about equally remote from the first and last links in the chain,—the source of the title, and the defendant, the last grantee. This deed in which it is claimed the defect appeared, *without* the abstract would therefore prove nothing.

These papers were introduced by the plaintiffs it would seem on the supposition, that it devolved on them to show the title defective, a burden which as we have seen, it was not incumbent on them to assume. As in my view of the nature of the issues in such cases, and upon the state of facts disclosed by the record, proof of title should come from the other side—the party asserting the validity of his title.

Tyler v. Parr.

In my opinion the judgment should be affirmed. Judge Wagner concurs.



A. M. TYLER, Plaintiff in Error, vs. W. S. PARR, Defendant in Error.

1. *Contracts—Real estate agents—Commissions, when entitled to.*—If property is put into the hands of a real estate agent to sell, he is entitled to his commission, if the sale is brought about by his advertisements or exertions, or if he introduces the purchaser or discloses his name to the seller, and through such introduction or disclosures the sale is effected, even though the sale may be made by the owner.

Error to St. Louis Circuit Court.

Morris and Peabody, for Plaintiff in Error.

If the agent introduces or discloses the name of the purchaser, and such introduction or disclosure is the foundation upon which negotiations are begun and the sale effected, he will be entitled to commissions, and this too although in point of fact the sale may have been made by the owner. (*Jones vs. Adler*, 34 Md., 440; *Lincoln vs. McClatchie*, 36 Conn., 136; *Bell vs. Kaiser*, 50 Mo., 150; *Wilkinson vs. Martin*, 8 Car. & P., 5.)

W. B. Thompson, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by plaintiff to recover of defendant commissions for procuring the exchange of real estate.

Plaintiff was a real estate agent, residing in Jefferson county, and the defendant owned a tract of land in that county, and desired to either sell it or exchange it for other property in St. Louis. Defendant accordingly placed this land in plaintiff's hands to have a sale or exchange effected, and was to pay him a certain commission for his services; plaintiff advertised the land for sale in his real estate advertiser, and final-

ly had a correspondence with one Hartman, who represented that he was agent for certain property in St. Louis, and was willing and ready to make the exchange. Plaintiff requested Hartman to call upon his attorneys in St. Louis, and they would furnish him all necessary information. He did so, and the attorneys then introduced him to the defendant. Afterward Hartman as the agent of one Shaw entered into a negotiation with the defendant, and the result was an exchange of property between the parties. Defendant then refused to pay plaintiff any commissions. On the trial the plaintiff asked two declarations of law :

1st. That if the jury found from the evidence, that the plaintiff's agency was the procuring cause of the negotiations between defendant and Shaw, which resulted in an exchange of defendant's property, the plaintiff was entitled to recover, even though the jury might further find that the negotiation was made with the defendant, and without his knowledge that plaintiff's agency was the procuring cause of said negotiations.

2nd. If the jury believed from the evidence, that Shaw was brought to a negotiation with defendant, which resulted in the exchange of defendant's property, from information given him by Hartman, and derived by Hartman from the plaintiff, while plaintiff was acting as the agent of defendant in relation to said property, then the plaintiff was entitled to recover. These instructions the court refused to give, and then on its own motion instructed the jury, that upon the evidence the plaintiff was not entitled to recover. Whereupon, plaintiff took a nonsuit, and after an unavailing effort to set the same aside he sued out his writ of error.

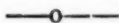
The court certainly erred in its ruling. There was sufficient evidence to take the case to the jury. Moreover the declaration asked by the plaintiff asserted correct propositions of law.

The law is well established, that in a suit by a real estate agent for the amount of his commission it is immaterial that the owner sold the property and concluded the bargain. If after the property is placed in the agent's hands, the sale is brought about or procured by his advertisement and exertions,

he will be entitled to his commissions. Or if the agent introduces the purchaser, or discloses his name to the seller, and through such introduction or disclosure negotiations are begun, and the sale of the property is effected, the agent is entitled to his commissions though the sale may be made by the owner. (Bell vs. Kaiser, 50 Mo., 150; Jones vs. Adler, 34 Md., 440; Lincoln vs. McClatchie, 36 Conn., 136; Durkee vs. Vermont Central Railw., 29 Vt., 127.)

Whereupon it follows, that the judgment must be reversed and the cause remanded.

Judge Sherwood is absent. The other Judges concur.



STATE OF MISSOURI, Respondent, vs. WILLIAM McMURPHY
Appellant.

1. *Evidence—Indictment—Good character, effect of.*—If the jury is satisfied of the prisoner's guilt from all the other facts and circumstances detailed in evidence, his good character cannot be looked to as a ground of acquittal.

Appeal from St. Francois Circuit Court.

John F. Bush & Joseph J. Brady, for Appellant.

The instruction given concerning the weight and bearing of evidence of appellant's good character was wrong, and was the virtual exclusion of that evidence from the jury. (2 Russell on Crimes, 785, 786; 1 Wharton American Criminal Law, §§ 645, 646, *et seq.*)

B. B. Cahoon, for Respondent.

Evidence to sustain a good character was admitted and submitted to the jury, and it was therefore the duty of the court to instruct the jury as to its legal effect. (State vs. Matthews, 20 Mo., 55; Gardiner vs. State, 14 Mo., 97.)

The instruction objected to, stated the effect of evidence of good character in criminal trials, and it contains the three following legal propositions: (a.) Evidence of good character is of most value in effecting the verdict of a jury in such cases,

when from the facts and circumstances detailed in evidence, the jury are in doubt as to the guilt of the defendant of the offense with which he is charged.

(b.) Where however the facts in the case indicate and show the guilt of the defendant of the offense, then, even uncontradicted evidence of good character cannot avail the defendant, so as to inure to his acquittal of the crime for which he is indicted.

(c.) In the case stated in the second proposition the only effect of evidence, (even when uncontradicted) establishing a good character is to lessen the punishment for the commission of the offense.

These propositions are correct. (1 Bishop Crim. Prac., § 1063; 2 Stark Ev., 365; 3 Phil. Ev., (Cowen & Hill's Notes, Van Cooks, Ed.) 623, 624, n. 318; Burrill, Cr. Ev., 530, 531, 532; Wilson Cr. Ev., 164, 165; United States vs. Freeman, 4 Mason, 510; Commonwealth vs. Webster, Bemis' Reports 495; Commonwealth vs. Hardy, 2 Mass., 317; The People vs. Vane, 12 Waddell, 78; Bennett vs. State, 8 Humph., 118; Freeland's Case 1 City Hall Recorder, 82; The People vs. Kirby, 1 Wheeler's Crim. Cases, 64; State vs. Wells, 1 Coke 424; State vs. Ford, 3 Strob. Law, 517; People vs. Josephs 7 Cal., 129; McDaniel vs. State, 8 Sm. & M., 401; People vs. Hammill, 2 Parker, C. C., 223; Wesley vs. State, 37 Miss., 327; United States vs. Rounderbust, Bald., 514; People vs. Cole, 4 Parker, C. C., 35; Stephens vs. People, *Id* 396; United States vs. Whittaker, 6 McLean, 342; Rex. vs. Davison, 31 State Trials, 217; Reg. vs. Frost, Gurney's Rep., 749; Rex vs. Haigh, 31 State, Pr., 122.)

ADAMS, Judge, delivered the opinion of the court.

The defendant was convicted of an assault with intent to maim his wife. Upon the trial the wife was the main witness who testified to the alleged assault. Some evidence was given to impeach her character for veracity and also to sustain it.

In like manner evidence was given of the good character of the defendant as a peaceable and quiet citizen and evidence to to impeach his character.

Barton v. St. Louis & Iron Mountain R. R. Co.,

The following instruction was given on the part of the State and objected to by the defendant. "7th. The court instructs the jury that the evidence of good character is of most value in cases, where the jury are from the facts and circumstances of the case in doubt, as to the guilt of the offense with which the defendant is charged. But where the facts in the case indicate and show the guilt of the defendant of the offense with which he is charged, then in such case uncontradicted evidence of good character cannot avail the defendant, or inure to his acquittal by the jury; in such case the only effect of uncontradicted evidence establishing a good character is to lessen the punishment for the commission of the offense."

This instruction is clearly erroneous. The first clause of the instructions as an abstract proposition may be true. In cases of doubt the good character of the prisoner ought to be of more weight than where the evidence is clear and positive. But in all cases whether the evidence of guilt is circumstantial or positive, the good character of the accused is proper evidence to go to the jury on the plea of not guilty. If however the jury is satisfied of the prisoner's guilt from all the other facts and circumstances detailed in evidence, his good character cannot be looked to as a ground of acquittal.

Some of the other instructions given on the part of the State are complained of as subject to verbal criticism, but they seem to be substantially correct.

For the error in the above instruction, the judgment will be reversed and the cause remanded.

—o—

WM. C. BARTON, Respondent, *vs.* ST. LOUIS & IRON MOUNTAIN
RAILROAD COMPANY, Appellant.

1. *Practice, civil, trials—Instructions—Negligence.*—When the facts are so clear and decided, that the inference of negligence is irresistible, it is the duty of the Judge to decide; but when the facts, or the inference to be drawn from them, are in any degree doubtful, the whole matter should be submitted to the jury under proper instructions.

Barton v. St. Louis & Iron Mountain R. R. Co.,

Appeal from St. Louis Circuit Court.

Dryden & Dryden, for Appellant.

I. There being no evidence of any negligence on the part of the defendant causing the injury complained of, it was the duty of the court to direct the jury accordingly.

II. The facts being agreed by the parties or found by the triers, negligence is a question of law for the court. (Sherman and Redf. on Negligence, § 11, note 3; Purvis vs. Coleman, 1 Bosw., 326; Moore vs. Westervelt, Id., 357; Dascomb vs. Buffalo and State Line R. R. Co., 27 Barb., 227; Biles vs. Holmes, 11 Ire., 19; Heathcock vs. Pennington, Id., 642; Pittsburgh & C. R. R. Co. vs. McClurg, 56 Penn. St., 300; Indianapolis & C. R. R. Co. vs. Rutherford, 29 Ind., 82.)

III. If the facts exist which are referred to the jury, by the instruction, they are upon principle, as well as upon authority, a bar to the plaintiff's action. (Todd vs. Old Colony R. R., 3 Allen, Mass., 18; S. C., 7 Allen, 207; Indianapolis & C. R. R. Co. vs. Rutherford, 29 Ind., 82; Pittsburgh & Connellsville R. R. Co. vs. McClurg, 56 Penn. St., 294; Sherm. & Redf. on Negligence, § 281, p. 318; Louisville & Nashville R. R. Co. vs. Sickings, 5 Bush. (Ky.) 1.)

Cline, Jamison & Day, for Respondent.

The law is fully settled in this State, that the question of negligence is a question of fact to be submitted to the jury. (Kennedy vs. N. M. R. R., 36 Mo., 351; Hulsenkamp vs. Citizens Railroad Company, 37 Mo., 537; Winters vs. H. & St. Joseph R. R. Co., 39 Mo., 468; McPheeters vs. H. & St. Jo. R. R. Co., 45 Mo., 22; Morrissey vs. Wiggins Ferry Co., 43 Mo., 380.)

EWING, Judge, delivered the opinion of the court.

This is an action for damages for an injury received by the plaintiff while a passenger on one of defendant's cars. The evidence tended to prove that when injured the plaintiff was sitting in the rear car of the train, at or near an open window, and that the injury to his arm was caused by the car coming

Barton v. St. Louis & Iron Mountain R. R. Co.,

in contact with a wagon loaded with a skiff among other things. As to the position of his arm at the time, whether inside or protruded out of the window, the evidence was somewhat conflicting.

There was a verdict and judgment for the plaintiff, and a motion for a new trial being overruled, the cause is brought to this court by appeal.

The court gave the following instructions to the jury at the instance of the plaintiff.

1. If the jury find that plaintiff was injured as charged in the petition, while being transported as a passenger in defendant's car from the city of St. Louis to the town of Carondelet, and that it was caused by the carelessness of defendant's agents and servants in running, conducting and managing said car or the train to which it was attached, without any fault, misconduct, or negligence on the part of plaintiff immediately contributing thereto then they must find for the plaintiff.

2. Although plaintiff may have failed to exercise ordinary care and prudence, while a passenger on defendant's car, which may have contributed remotely to the injury complained of, yet if the employees of defendant were guilty of negligence, which was the direct and immediate cause of the injury, and might have prevented it by the exercise of prudence and care, the defendant is liable.

The court refused to give the following instructions asked by defendant.

1. That although the jury may find from the evidence, that the plaintiff while riding as a passenger in defendant's car was injured, by having his arm broken, yet if they further believe from the evidence, that at the time such injury happened the plaintiff's said arm was by the inadvertence of the plaintiff protruded through and out of the window of the said car, and that but for his said arm being thus out of said window, the plaintiff could not and would not have received the injury complained of, the verdict should be for the defendant.

2. The court instructs the jury, that although they may believe from the evidence, that the plaintiff while riding as a

passenger in defendant's car was injured by having his arm broken, yet if they further believe from the evidence, that at the time such injury happened plaintiff's arm was by the inadvertence or carelessness of plaintiff protruded through and out of the window of said car, and that plaintiff was guilty of negligence in thus placing his said arm, contributing directly to the injury complained of, the verdict should be for the defendant.

The court gave the following instruction namely :

That although the plaintiff was injured by having his arm broken, yet if at the time of said injury, plaintiff by negligence or carelessness had his arm out of the window of said car, and that such negligence or carelessness contributed directly to the happening of such injury, the verdict should be for the defendant.

The principal question arises upon the first instruction asked by the defendant; whether the hypothetical facts of that instruction constituted negligence *in se* and barred a recovery. The instruction virtually assumes that it was immaterial in what manner or from what cause the collision which produced the injury occurred; that the protrusion of the arm of plaintiff out of the car-window was negligence, which must defeat the action, if in the language of the instruction the injury *could not* and *would not* have happened but for this act of the plaintiff.

It also assumes that there was no evidence of negligence on the part of the defendant or its employees; that the fact of an obstruction being on or near the track was not to be considered by the jury in passing upon the question of negligence; that the defendant had no duty to perform in keeping a lookout for obstructions of this nature; that although the engineer may have seen the wagon on or near the track before the collision occurred, it was not his duty to stop the train or endeavor to do so to avoid the danger. It also assumes as immaterial the fact that the collision happened at a place on the track, and under circumstances, which were not calculated to excite any apprehension of danger in the mind of a man of ordinary pru-

dence, who was a passenger, and situated as plaintiff was, or to call for extraordinary care on his part; and that no reasonable degree of vigilance could have foreseen or anticipated it. It also further assumes that the collision, sufficient to tear off the battings from the car, and also the hind steps of the car, could not have been the cause of the very act of the plaintiff, which is imputed to him as culpable negligence or inadvertence; that the force could not have been applied to the car in such a manner as to have irresistibly forced plaintiff's arm outside of the window; or that it could not have been an involuntary or mechanical movement, prompted by an instinctive shrinking from imminent danger, the nature of which he may have been equally disqualified at the time to comprehend or guard against.

All these circumstances were virtually excluded from the consideration of the jury by the instruction; and they all had a bearing directly or remotely on the question of negligence.

The negligence, which will prevent a recovery in such cases, is nothing more than the absence of proper care, such care as a person of ordinary prudence would exercise under similar circumstances; and this question is almost always more or less affected by the conduct of the defendant; a solution of it is rarely found in the conduct of the complaining party alone.

Inadvertence is not necessarily culpable. It may be so, or not, according to circumstances. The instruction assumes that it *was culpable* in the case before us. Negligence of such a character as to defeat the action is predicated of an act of inadvertence, which as we have seen may have been caused by the misconduct of the defendant, which misconduct the jury under the instruction would not have been permitted to consider. The evidence as already observed was conflicting as to the position of plaintiff's arm at the time the collision occurred, and also as to facts which tended to show negligence on the part of the defendant. Upon the state of facts thus disclosed the defendant insists, that the question of negligence should have been taken from the jury, and that the court should have declared as a matter of law, that if the plaintiff's arm was protruded

through the window by inadvertence, and the injury could not have resulted but for that act, there could be no recovery.

The proposition is that negligence is a question for the court, not the jury. On this question there is an apparent conflict of authority but it is only apparent, so far as I have seen, with few exceptions.

In the State of Connecticut it seems to have been held in one case, that negligence is so peculiarly a question of fact, that it should be left to the jury even on a conceded state of facts. (19 Conn., 566.)

This in my view is erroneous. Whether it is a question for the court or the jury must be determined by the facts of the particular case. Negligence is in all cases in a certain sense a question of fact for the jury; that is, it is for the jury to determine, whether the facts bearing upon the question exist or not. But when the facts are undisputed or are so clearly proved as to admit of no doubt, it is the duty of the court to apply the law without submitting the question to the jury. This involves no invasion of the province of the jury, nor any infringement of their legitimate functions, no more than when the court passes upon a demurrer to the evidence, or on motions for new trials upon the ground of the want of any evidence to sustain the verdict of a jury.

In *Keller vs. The New York Central Railroad Company*, 24 Howard Pr., 172, this view is aptly expressed by the learned Judge, who says: "when the facts are so clear and decided, that the inference of negligence is irresistible, it is the duty of the Judge to decide; but when the facts or the inference to be drawn from them are in any degree doubtful, the only proper rule is to submit the whole matter to the jury under proper instructions."

The only difficulty is in making a practical application of it to the particular case. The cases cited by counsel from Indiana, North Carolina and Pennsylvania, as I view them, are not inconsistent with this rule. There is nothing in those cases, in my opinion, that warrants the deduction, that negligence is always a question for the court, and not for the jury.

In the case of Pittsburg C. R. R. Co. vs. McClurg, 56 Penn. St., 300, the evidence was not before the court, but it appeared from the record, that the plaintiff, McClurg, while a passenger on defendant's train of cars, suffered his elbow to project from the window of the car in which he was a passenger, and in passing a switch it came in contact with a car standing on the switch, and was broken. The court held upon the state of facts as matter of law, that plaintiff was guilty of a want of due care which would prevent him from maintaining the action. The court say, where a traveller puts his elbow, or an arm out of a car-window voluntarily, *without any qualifying circumstances impelling* him to it, it must be regarded as negligence *in se*, and when that is the *state of the evidence*, it is the duty of the court to declare the act negligence in law!

In some of the decisions of this court, language is employed to the effect, that the question of negligence is peculiarly and exclusively for the jury; but such language must be interpreted in view of the facts of the case, as they affect that question—not as legal propositions of universal application. There is an exception, however, in the case of Huelsenkamp vs. The Citizens Railway Company, 34 Mo., 54. The learned Judge says in delivering the opinion of a majority of the court: "A court cannot direct a jury that such or such supposed facts show negligence, or that such other supposed facts do not show negligence." The proposition here asserted is, that upon no state of facts is it the right or province of the court to apply the law, or pronounce the legal effects of facts affecting that question, however clearly proved, or even if they were undisputed. Such a proposition as we have endeavored to show is untenable.

The case of Devitt vs. The Pacific Railroad Company, 50 Mo., 302, is not in conflict with the rule above stated. The facts in that case, affecting the question of negligence of the deceased,—who was an employee at the time of the company—were undisputed; and the court held that it was a proper case therefore for instructing the jury, that certain enumerated facts (which unlike the case at bar were *all the facts*,) if found to

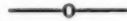
exist, constituted such contributory negligence as would prevent a recovery; and properly held the refusal to give such an instruction erroneous; there being no doubt as to the facts, nor as to the inference to be drawn from them, it was the duty of the court to declare their legal effect.

The instructions given by the court, taken together, present the law applicable to the case, very fully and clearly.

The only remaining point is the refusal of the court to give an instruction in the nature of a demurrer to the evidence at the close of plaintiff's testimony. In this the court committed no error. The evidence adduced by the plaintiff showed that the injury to his arm was caused by a collision of the car with a wagon and skiff near the track, in the manner already described, and that the engineer could have seen this obstruction at the distance of some two hundred yards; that no warning was given by him to put on the brakes, and that the train might have been "broken up," or stopped by the time it reached the obstruction.

Upon this state of facts, the court properly refused to give the instructions asked.

Judgment affirmed. The other Judges concur.



EUSTACE F. GOLSON, et al., Appellants, vs. ELLIS B. EBERT,
Respondent.

1. *Agent—Statements, when made—Principal, liability of.*—Statements of agents do not bind their principals, unless made at the time of the transaction so as to form part of it.
2. *Evidence—Prices current—Secondary evidence.*—A price current of the prices in a city is only secondary evidence, and not the best evidence obtainable.
3. *Contracts—Made in one country, and ratified in another—What law controls.*—If a contract is made in one State and to be fulfilled there subject to ratification by a party in another State, when ratified the contract is to be interpreted by the laws of the first State.

Appeal from St. Louis Circuit Court.

Moss and Sherzer, for Appellants.

I. In cases of general agency, a principal is bound, though the agent disobeys his instructions in making a contract within the scope of his employment. (Story on Agency, §§ 126, 127; Butler vs. Maples, 9 Wal., 766; Pickering vs. Busk, 15 East, 37; Gilman vs. Robinson, 1 Ry. & Mod., 226; Winter vs. Pacific R. R. Co., 41 Mo., 503.)

II. Plaintiff's Instruction, No. 5, directed the attention of the jury to the testimony introduced in evidence, in determining whether or not such general agency existed, and should have been given. (McDevitt vs. Pacific R. R. Co., 50 Mo., 302; Fitzgerald vs. Hayward, 50 Mo., 516; Sawyer vs. Han. & St. J. R. R. Co., 37 Mo., 240; Clark vs. Hammerle, 27 Mo., 55.)

III. Instructions, Nos. 1 and 2, given by the court, are erroneous. 1st, In that they neglect, and fail to present the vital distinction between an agent vested with general, and one with limited authority in binding the principal, whose instructions he may have disobeyed or transcended. 2nd, In that they leave the question of agency to be solved by inference and conjecture. 3rd, In that they had a direct tendency to mislead the jury and left them to all the latitude of inference. 4th, In that they were too general and abstract, and might mislead the jury. 5th, In that, taking the two instructions together, it would seem that the agent must have been in fact authorized to make said contract. (McDermott vs. Donegan, 44 Mo., 85; Mead vs. Brotherton, 30 Mo., 201; Chappell vs. Allen, 38 Mo., 213.)

IV. Defendant's Instruction No. 2 was wrong, in that it fails to distinguish between the obligations of principal, flowing from a general agency, when instructions are disobeyed, and was calculated to mislead. (Chappell vs. Allen, 38 Mo., 213, 221-2; Fitzgerald vs. Hayward, 50 Mo., 516, 523.)

V. Defendant's 3rd Instruction is the law, even in respect to orders. (Biggs vs. Lawrence, 3 Term R., 454, 456, Territt vs. Bartlett, 21 Vt., 184, 187, 191; Backman vs. Wright, 27 Vt. 187, 189; Backman vs. Mussey, 31 Vt., 547, 551; Albion Co. vs. Mills, 3 Wil. & Shaw, 218-233.)

Golson, et al. v. Ebert.

VI. The law where the contract is to be performed, governs as to its validity. (Story on Conflict Laws, p. 432, §§ 280, 242, p. 367 § 242; *Andrews vs. Pond*, 13 Peters, U.S., 65-78; *Penobscot & Ken. R. R. vs. Bartlett*, 12 Gray, 244-248; *Hall vs. Costello*, 48 N. H., 176-179; *Ruse vs. Mutual Benefit Life Ins. Co.*, 23 N. Y., 516-521.)

The approval of the contract being its ratification, it was even in its making a Louisiana contract, and its validity to be determined by her laws. (Story on Conflict of Laws, § 286; Story on Conflict Laws, § 244, p. 288.)

VII. Testimony tending to discredit plaintiff's financial standing, was wholly irrelevant. (*Eddy vs. Baldwin*, 32 M., 369-374; *Blair vs. Corby*, 29 Mo., 480-486.)

Noble & Hunter, for Respondent.

The question is what power a third person dealing with an agent, had a right to infer from the conduct of the principal that the agent possessed. (*Johnson vs. Jones*, 4 Barb. Sup. Crt., 399-373; 1 Am. L. Caus. p. 550.)

VORIES, Judge, delivered the opinion of the court.

Plaintiffs charge that they were partners doing business in New Orleans, Louisiana, in the name of F. Golson & Co., that defendant and one Spotswood were doing business in St. Louis under the name of E. B. Ebert & Co., that on or about the 26th of April, 1870, in said city of New Orleans, said Ebert & Co., by their authorized agent contracted and agreed with plaintiffs to furnish them, 300 rolls and 50 half rolls (Douglas bagging,) at the price of 24 1-2 cents per pound, to weigh 2 1-8 lbs. to the yard, and to be as good in every respect as a sample there exhibited by said agent, and to be delivered to plaintiffs in said city of New Orleans on the 15th day of July, 1870, which plaintiffs agreed to pay for on delivery, by the acceptances of plaintiffs, payable four months after date. That before the time for the delivery of the bagging by the terms of the contract, the price of bagging advanced rapidly. That defendant failed and refused to deliver the bagging, although requested thereto, and the pay therefor was tendered as per contract, for which failure damages are claimed, &c.

The defendant, by his answer, denies the making of the contract charged, by their duly authorized agent, for said quantity of bagging, or for any bagging, or for any price or upon any terms whatever, and denies every material allegation in the petition, except he does not deny that he was requested to, but refused to perform the contract.

A trial was had before a jury, and there the plaintiffs read in evidence the deposition of E. F. Golson, (one of the plaintiffs,) by which the contract as stated in the petition, was fully proved. It was also testified to in said deposition, that Stringfellow, with whom the contract was made, was the agent of defendant, that witness knew he was the agent by having dealt with him before, and that in said dealings defendants had recognized him as such, and acted upon and performed the contracts of Stringfellow as such agent. It was also stated in said deposition, that upon defendant's business cards Stringfellow's name appeared as an agent. This evidence in the deposition in reference to the card was stricken from the deposition by the court, as being incompetent and irrelevant, and plaintiff excepted. Said deposition also showed, that long after the contract made with said Stringfellow, the said Stringfellow still professed to be the agent of defendant to sell bagging, and offered to sell plaintiffs more bagging, but at an advanced price. That he was acting as agent of defendants in Texas and other Southern States, and at New Orleans, &c. The said deposition also contained a statement, that the witness, some months after the contract was made, had a conversation with said Stringfellow, in which he stated that "he had notified defendant of the contract made with plaintiffs, and that defendant's firm would "come to time." This was also stricken out as being irrelevant and incompetent, and the plaintiffs excepted. It was also stated in said deposition, that about a month after the making of the contract sued on, plaintiffs wrote a letter to said Ebert & Co., in which plaintiffs expressed the hope that defendants would find it convenient to deliver at least a part of the bagging prior to the 15th of July, 1870. That in reply Ebert, & Co., stated "that on the terms of

your order as to price, &c., they could not fill," and quoted the price of bagging in the west, but in said letter, plaintiffs were not informed, whether said Ebert, & Co., were or were not dealers in bagging. This part of said deposition was also stricken out by the court, on the ground that it was also irrelevant and incompetent. The plaintiffs' again excepted.

The plaintiffs also introduced the deposition of one Chism, by which the price of bagging was proved in July, 1870, and with which deposition there was an exhibit filed, proved by said deposition to be a price current issued at New Orleans at said time. This price current was rejected as evidence by the court, as being incompetent and irrelevant, and the plaintiff again excepted.

The deposition of William F. Tutt was read, by which it was proved that he was dealing in bagging in the city of New Orleans in July, 1870—that 30 cents was the wholesale and 32 cents the retail or jobbing price of bagging in the New Orleans market at that time, that witness' knowledge of prices is derived from actual sales; that he did not at all times regard the price current of New Orleans as the authority for prices of bagging. The deposition of one Micaw was also introduced, which proved that the deponent was present in New Orleans at plaintiffs' office, and heard plaintiffs demand of Stringfellow, the supposed agent, the bagging named in the contract, that Stringfellow replied that he did not have the bagging, and walked out of the office.

The deposition of E. G. Crews was introduced, in which it was stated that he was a merchant, belonged to the firm E. G. Crews & Son, was in general grocery business at Montgomery, Alabama, had the first transaction with Ebert & Co., of St. Louis, through W.R. Stringfellow who represented himself as agent selling goods for Ebert & Co.,—bought a car load of bran from Stringfellow on thirty days' time, in Nov., 1869.—Stringfellow first introduced deponent to a business relation with Ebert & Co. Said contract was final and unconditional, and was not subject to the approval of Ebert & Co. Said Ebert & Co. complied with said contract by shipping the bran

bought. Stringfellow held himself out as the general agent for Ebert & Co. to sell goods. That the usage of trade amongst merchants is to sell and purchase bagging and manufactured articles at from two to four months' time. It was also proved, that prior to the making of the contract sued on, plaintiffs had bought corn of defendants through their agent, Stringfellow, and that the contract was filled by Ebert & Co. without question, and that said Stringfellow had, before and about that time, been in the habit of making sales of provisions and other commodities at New Orleans and other places in the south, and that the orders so taken and contracted for, were filled and performed by defendants without objection; that the purchase of the bagging was made unconditionally, without any reference to its being approved by the defendants or any other person.

The depositions of several witnesses were read, which tended to prove that said Stringfellow was the recognized agent of Ebert & Co., sold large quantities of goods at Jefferson, Texas, to divers persons, consisting of bagging, flour, bacon and other commodities; that some of the sales made by Stringfellow, as the agent of defendants, were on credit, and that they were all for absolute unconditional sales of the goods, and were all recognized and performed and settled by Ebert & Co.; that Stringfellow was the generally recognized agent of defendants. That these transactions were had through the months of March and April of 1870, and through the fore part of that year.

The plaintiffs then read in evidence from the Code of Louisiana as follows: "All agreements relative to personal property and all contracts for the payment of money, where the value does not exceed five hundred dollars, which are not reduced to writing, may be proved by any other competent evidence; such contracts or agreements above five hundred dollars in value must be proved at least by one credible witness and other corroborating circumstances."

The defendants then read the deposition of W. R. Stringfellow, by which the evidence of plaintiffs, in reference to the

contract sued on was contradicted ; he stated that he made no contract of the kind, that plaintiffs proposed purchasing the bagging named, that he took a memorandum of the proposition, told plaintiffs he would send it to Ebert, who could see if the manufacturer would fill the order. That witness was the agent of Ebert & Co., to take orders for goods, but that said orders had always to be sent to them for their approval ; that sometimes he had fixed the price of commodities when he was posted and authorized by Ebert & Co. to do so. That at the time the talk was had with plaintiffs about the bagging, he told them that Ebert and Co. had no interest in the bagging, that the proposition would have to be submitted to the manufacturer, as all that Ebert had to do with it was, that he got 2 1-2 per cent. for selling. Witness stated that he took orders for Ebert & Co. on commission. Witness was asked as to the standing commercially of plaintiffs, whether good or bad, and answered that it was not good. The plaintiffs objected to this question and answer being read in evidence, on the ground that it was incompetent and irrelevant ; their objection was overruled, and they excepted. The defendant was examined himself, together with several other witnesses, whose evidence tended to show that said Stringfellow was only the agent of defendant to solicit orders, without authority to make contracts ; but that when orders were given him he sent them to Ebert & Co. for their approval, and that the purchase made by plaintiffs, of which they testified, was an order sent by Stringfellow, which defendant modified and plaintiffs accepted the modification ; that defendant and his partner had nothing to do with bagging, except when Stringfellow would get an order for bagging they would send it to defendant, who would try to fill it, —that Douglass the manufacturer of the bagging sent the samples to Stringfellow, &c.

The court at the request of the plaintiffs instructed the jury as follows :

“The court instructs the jury, that if they believe from the evidence that the contract sued on was made in and to be performed in the State of Louisiana, then the law of that State

must govern in determining the validity of said contract, and that by the laws of said State, to make such contract valid it need not be reduced to writing."

The court on its own account gave the jury the following instructions:

"If the jury believe from the evidence that the defendant employed one Stringfellow as their business agent, and sent him out and accredited him as their agent, then they are bound by the acts and contracts of said Stringfellow, made within the scope of the credit and authority thus given him, and if the conduct of the defendants themselves with regard to the agency of said Stringfellow was such that plaintiffs could fairly infer that said Stringfellow had authority to make the contract in plaintiffs' petition alleged, and if the jury believe from the evidence that said Stringfellow did in fact make said contract with plaintiffs, then the same is binding on the defendants."

2nd. "The jury are instructed, that they cannot find for the plaintiffs, unless they believe from the evidence, that the said Stringfellow was in fact authorized by defendants to make such contract of sale as that in plaintiffs' petition alleged, or that the conduct of the defendants themselves in regard to the agency of said Stringfellow was such, that the plaintiffs had a right fairly to infer that he was so authorized; and the burden is on the plaintiffs to satisfy the jury of the facts contemplated by this instruction and by the preponderance and weight of the evidence."

3rd. "If the contract for the sale of the bagging was made by Stringfellow, and was binding on defendants, and if defendants failed to comply with the same by delivering the bagging at the time and place named in the contract, the jury will find for the plaintiffs, and the measure of damages will be the difference between the contract price and the market price at the time and place of delivery, not exceeding the sum claimed with interest from the commencement of this action."

4th. "The court instructs the jury, that the burden is on the plaintiff to prove to the satisfaction of the jury.—

1st. The contract for the sale of the bagging was made and is binding. 2nd. The price to be paid for the same by the plaintiffs, of which the commission, freight and insurance is part,— 3rd. The time and place of delivery. 4th. The failure of the defendants to deliver the same pursuant to the terms of the contract, and 5th, The market price of the bagging at the time, and at the place, at which the same was contracted to be delivered."

To the giving of the above instructions by the court the plaintiffs objected and excepted.

The court then instructed the jury on the motion of the defendants as follows:

1st. "If the jury believe from the evidence, that the contract alleged to have been entered into between plaintiffs and one Stringfellow, as the agent of defendants, was subject to the approval of the defendants at St. Louis, then the plaintiffs are not entitled to recover in this action, and the jury must find for the defendants, unless the jury believe from the evidence that the same was approved by the defendants."

2nd. "If the jury believe from the evidence, that W. R. Stringfellow was acting for the firm of E. B. Ebert & Co., under special instructions and with limited authority, so that he was not authorized to make absolute contracts of sale on account of said house, and that the defendant did not otherwise represent him to be, to the plaintiffs or to the public generally, with the knowledge of the plaintiffs, then the court instructs the jury, that the plaintiffs dealt with said Stringfellow at their own risk, and defendants were not bound by his contracts beyond his authority, unless subsequently approving the same. The jury may, however, consider the dealing of said Stringfellow with the public generally, and defendants' conduct in regard to such dealing, in determining whether said Stringfellow was acting under special instructions or had general authority to make such contracts as that in plaintiffs' petition alleged."

3rd. "If the jury believe from the evidence, that the alleged contract between plaintiffs and defendants as a member of

the firm of E. B. Ebert & Co., of St. Louis, was made at New Orleans, Louisiana, but subject to the approval of the said Ebert & Co. at St. Louis, Missouri, then the court instructs the jury, that the validity of said contract depends upon the laws of Missouri, and unless the jury find that some part of the goods were delivered to plaintiffs, or some part of the price paid by plaintiffs, or there was a written agreement made between the parties and signed by defendant, or the firm of E. B. Ebert & Co. or their agent duly authorized, and delivered to plaintiffs, then said contract was not good, and the jury must find for the defendants.

To the giving of which instructions the plaintiffs excepted.

The plaintiffs asked the court to give the jury several instructions, which were refused, and the plaintiffs excepted, but it is not necessary that they should be repeated here.

The jury returned a verdict for the defendant. A motion was made by the plaintiffs for a new trial, setting forth as grounds the opinions of the court excepted to. This motion being overruled, plaintiffs again excepted. After final judgment had been rendered for the defendants the plaintiffs appealed to the General Term of said court, where the judgment was affirmed, and an appeal taken to this court.

The questions raised by the record in this case to be considered by this court are, as to the propriety of the action of the court that tried the cause in receiving and excluding evidence received and rejected on the trial, when the same was objected to, and as to the propriety of the action of the court in giving and in refusing instructions to the jury.

The first point raised is, that the court struck out from Golson's deposition that part in which it was stated that he knew Stringfellow to be the agent of the defendant because his name was printed as such on plaintiffs' cards. This evidence was properly rejected, as no evidence was given tending to show that such card or cards were circulated with either the knowledge or consent of defendants.

The evidence as to the correspondence between the parties was also properly stricken out, as it was not shown that any

efforts had been made to procure the letters themselves, or copies thereof. The evidence in reference to what was said by Stringfellow, long after the supposed contract was made, was also properly rejected. No admissions or statements made by an agent can be given in evidence against the principal, unless the statements were made at the time of the transaction to which they refer so as to form a part of the transaction.

The price current at New Orleans offered in evidence by the plaintiffs, was also properly excluded by the court. There at least should have been satisfactory evidence, that it contained a correct statement of the prices, by one who knew the fact, in order to admit it in evidence. The price current was only secondary and not the best evidence of the material fact to be proved, which was the actual price or value of bagging on the 15th day of July, 1870, and then the price current is not set forth in the bill of exceptions, so that its materiality can be seen.

The defendant proved by the deposition of Stringfellow, the commercial standing of the plaintiffs, and that their standing was bad. This evidence was objected to by the plaintiffs on the ground, that it was incompetent and irrelevant, but the court overruled the objection, and admitted the evidence. The action of the court in this particular was erroneous: there was no issue in the case involving the commercial standing of the plaintiffs, and there was no pretense that their standing was not known to defendant and his agent at the time of making the supposed contract, so that in any view of the case, this evidence was wholly immaterial, and could only be calculated to prejudice and mislead the minds of the jury, and ought to have been rejected. (*Eddy vs. Baldwin*, 32 Mo., 369.)

It is true that courts will not always reverse a case merely on the ground that irrelevant evidence has been admitted that could from the nature of the case do no harm, yet whenever the evidence tends to prejudice or mislead the jury, it is good ground for reversal. (*Blair vs. Corby*, 29 Mo., 480.)

The next ground of objection raised in this case, is as to

the propriety of the instructions given by the court. By the fourth instruction given to the jury by the court the jury are told, "that the burden is on the plaintiffs to prove to the satisfaction of the jury"(amongst other things) "the failure of the defendant to deliver the same, (the bagging) pursuant to the terms of the contract;" this part of instruction four was not applicable to the facts of this case. There was no such issue before the jury; the petition charged that the bagging had been demanded and its delivery refused by the defendants. These allegations were not denied by the answer, hence the burden of proving said facts were not on the plaintiffs; in fact, there was nothing either in the pleadings or evidence in the case which even tended to make such an issue before the jury; the whole theory of the defendant was, that he had made no such contract; performance was not pretended, but non-performance admitted.

The third instruction given by the court at the request of the defendant, told the jury that if the contract was made by the agent, Stringfellow, at New Orleans, in the State of Louisiana, but was made subject to the approval of the said Ebert & Co., at St. Louis, Missouri, then the validity of the contract would depend on the laws of Missouri, and that unless some part of the goods were delivered to plaintiffs, or some part of the price paid by plaintiffs, or a written agreement made between the parties, and signed by the defendant or his agent duly authorized, and delivered to the plaintiffs, the contract was not binding, &c.

This was clearly wrong. If the agent made the contract, in New Orleans, which was beyond his authority, and it was made subject to its being ratified or approved by his principal in St. Louis, and was afterwards ratified by the principal at St. Louis, it would become binding not as a new contract made at St. Louis, but the contract would become binding as made and where made by the agent, and would have just the same effect as it would have if the agent had been fully authorized to make the contract before it was made, and no ratification was necessary. (Story on Agency, §§ 239, 244.)

Clark, et al. v. The Covenant Mutual Life Insurance Co.,

This contract was made in New Orleans, was to be performed in New Orleans, and if it was ratified by defendant it was a ratification of the contract made there and to be performed there, hence we must look to the laws of Louisiana to ascertain its validity, and the statute of frauds in Missouri cannot affect it. (Story's Conflict of Laws, § 242, and following.)

The instructions, four and five, asked for by plaintiffs, and refused by the court, ought to have been given; they contained a proper exposition of the law of agency as applicable to the facts of this case. The instructions given by the court however, contained the same principles of law, as those asked by the plaintiff and refused, and although they do not so well present the law applicable to the particular facts in the case, yet they would not be likely to mislead the jury, so that if there were no other errors committed than the refusal of the court to give the said instructions asked for by the plaintiffs, that of itself might not be deemed sufficient to reverse the judgment.

For the errors aforesaid, the other Judges concurring, the judgment is reversed, and the cause remanded. Judge Wagner absent.



MARIA LOUISA CLARK, *et al.*, Respondents, *vs.* THE COVENANT MUTUAL LIFE INSURANCE COMPANY OF ST. LOUIS, Mo., Appellant.

1. *Presumptions of law—Real Estate, ownership of—Possession.*—The general presumption is, nothing appearing to the contrary, that the party who has the exclusive legal title to real estate, has also the possession.
2. *Equity—Cloud on title—Possession, lack of.*—A party not in possession cannot go into equity to have a cloud removed from his title as against one in possession holding under a deed.
3. *Equity—Cloud on title—Record—Defect apparent.*—When the opposite party can only claim title through the record, and a defect appears upon the face of such record, there is no cloud on the title such as will call for the exercise of the equitable powers of the court.

Clark, et al. v. The Covenant Mutual Life Insurance Co.,

4. *Equity—Cloud on title—Record—Extrinsic evidence.*—Where the opposite party can claim title only through the record, and there is no defect apparent on the record, but such defect must be proved by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it, there is a cloud on the title.
5. *Evidence—Deed—Title—Grantor's interest.*—In showing title under a deed, or a cloud on a title through a deed, it is necessary to show that the grantor had some sort of title, either real or apparent.
6. *Practice, civil, pleadings—Equity, bill in—Multifariousness.*—A bill in equity is multifarious, when the distinct and independent matters are improperly joined; as several matters perfectly distinct and unconnected united in one bill against one defendant, or the demand of several matters of a distinct and independent nature, against several defendants in the same bill.

Appeal from St. Louis Circuit Court.

Dryden and Dryden, for Appellant.

I. Equity will not interfere except where the party is in possession, and there is no allegation to that effect in the petition. (*Apperson vs. Ford*, 23 Ark., 746; *Harris vs. Smith*, 2 Dana, 11; *Alton M. & F. Ins. Co. vs. Buckmaster*, 13 Ill., 205; *Ward vs. Dewey*, 16 N. Y., 529; *Orton vs. Smith*, 18 How., 265; *Armitage vs. Wickliffe*, 12 B. Mon., 494; *Haythorn vs. Margerem*, 3 Halst. ch., 342; see also, *Lake Bigler Road Co. vs. Bedford*, 2 Nev., 399; *Moran vs. Palmer*, 13 Mich., 367.)

II. The petition alleges that the plaintiffs are husband and wife, and that the deed to Newman was made in the name of the wife alone. Being so made without the joinder of the husband it was void on its face. A deed void on its face, is no cloud on the title, and there is no need for equity to interfere. (*Gamble vs. City of St. Louis*, 12 Mo., 620; *Graham vs. City of Carondelet*, 33 Mo., 262; *Piersoll vs. Elliott*, 6 Peters, 98; *Ward vs. Dewey*, 16 N. Y., 528.)

J. S. Garland, for Respondents.

I. No judgment or decree can avail us anything, which does not cancel and annul the deeds mentioned in the petition. A court of law cannot cancel them. (*Hamilton vs. Cummings*, 1 Johns. Ch., 520-524; *Hawkshaw vs. Parkins*, 2 Swanst. Ch., 546.)

Clark, et al. v. The Covenant Mutual Life Insurance Co.,

But courts of equity have long exercised full power in this behalf. (Story. Eq. Jur., §§ 699, 700.) And courts of chancery in cases of forged instruments have decreed the same to be given up and cancelled without any prior trial at law on the point of forgery. (Sto., Eq. Jur., §§ 701, 702; Peake vs. Highfield, 1 Rus. Ch., 560.)

II. We are entitled to protection against future injury from the instruments in question, which cloud may eclipse our title—injury which may become irreparable from lack of the necessary proof and ability to defend against it. (Bromley vs. Holland, 7 Ves., 20; Kemp vs. Pryor, *Id.*, 248; St. John vs. St. John, 11 Ves., 535; Peake vs. Highfield, 1 Rus., 559.)

III. The appellant cannot complain that the petition is multifarious, unless the petition is multifarious as to them. (McGlothlin's Admr. vs. Hemery, 44 Mo., 355; Campbell vs. Mackay, 7 Sim., 564; S. C. on Appeal, 1 Mylne & Craig, 603; Sto. Eq. Pl., §§ 271, (a.) (b.), 284, 531.)

IV. The husband must be joined as a plaintiff with the wife (since she is necessarily a party in the case at bar) under the provisions of our statute. (W. S., 1001, § 8; Latshaw vs. McNees, 50 Mo., 381.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit in the nature of a bill in equity to remove a cloud from the title of the plaintiff Maria L. Clark, to certain land in the City of St. Louis. The petition alleged that the plaintiff Maria L., who is the wife of the other plaintiff, was at the time of the bringing of the suit and for a long time had been the sole owner of the land, that on the 15th of March, 1869, some person unknown, without the knowledge of the plaintiff, falsely personated the plaintiff Maria L., and made in her name alone a forged deed to one Newman, purporting thereby to convey to said Newman the land, that afterward on the 23rd day of March, 1869, said Newman conspiring with the defendant, the Covenant Mutual Life Insurance Company, made to the trustees of said company a deed of trust, purporting to convey said land to said trustees, in trust for the pur-

Clark, et al. v. The Covenant Mutual Life Insurance Co.,

poses mentioned in said deed; that afterwards on the 1st day of April, 1869, said Newman again conspiring with one Quinlan, who was originally made a co-defendant with the defendant here, made a deed to said Quinlan purporting to convey to him the equity of redemption in said land, that all of these deeds have been placed of record in the office of the recorder of St. Louis County, and that by the making and recording of the same plaintiff's title to the land has been obscured and clouded; and accordingly prayed that the deeds might be canceled and rescinded, and that plaintiff's title might be cleared of the cloud cast upon it.

To this bill the defendant and Quinlan both filed demurrers. The grounds of defendant's demurrers were: That the petition did not state facts sufficient to constitute a cause of action; that there was no equity in the petition; that upon the facts stated the plaintiff was not entitled to any relief; that the petition was multifarious; and that there was a misjoinder of parties defendant and also parties plaintiff.

The court overruled the demurrers, when the case was dismissed as to Quinlan, and the defendant refusing to further answer, a decree was entered for the rescission and cancellation of the forged deed.

A bill is said to be multifarious, when distinct and independent matters are improperly joined whereby they are confounded, as, the writing in one bill of several matters perfectly distinct and unconnected, against one defendant, or the demand of several matters, of a distinct and independent nature, against several defendants in the same bill. Whilst the suit was pending against both the defendant and Quinlan, there might have been some foundation for the charge, but after the dismissal as to Quinlan, it seems to me there was then no further objection on that account. The only thing that was then left to be contested was the validity of the conveyance by which the defendant claimed an interest in the property. The dismissal also disposes of the question relating to the misjoinder of the parties defendant, and there was no misjoinder of the plaintiffs, for the husband was a proper party to

Clark, et al. v. The Covenant Mutual Life Insurance Co.,

sue in conjunction with his wife. (Latslaw vs. McNees, 50 Mo., 381.)

It is insisted that the petition is defective, because it is not expressly alleged that plaintiff was in possession of the premises and that a bill to remove a cloud from the title lies only in behalf of one who is in the actual possession. The bill states that the plaintiff was, and for a long time had been, the legal owner of the land mentioned, and I think it may be assumed therefore, that at the time of the commencement of the suit, the plaintiff was in the possession of the premises. This fact is not directly averred in the petition, but it would seem to follow as a legal deduction from the facts that are averred. There is no point raised that any one else was in possession, and the general presumption is, nothing appearing to the contrary, that the person who has the exclusive legal title, has also the possession which usually accompanies that title. A party out of possession cannot go into a court of equity to have a cloud removed from his title as against one in possession holding under a deed. In such a case there would be no necessity for the exercise of the equitable jurisdiction of the court, as the title might be determined in an action at law. The settled rule is, that when a defect appears upon the face of the record through which the opposite party can alone claim title, there is not such a cloud upon the title as to call for the exercise of the equitable powers of the court to remove it. But when such claim appears to be valid upon the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it, it presents a case for invoking the aid of a court of equity to remove it, as a cloud upon the title. (Cox vs. Clift, 2 Comst., 118; Ward vs. Dewey, 16 N. Y., 529; Piersoll vs. Elliott, 6 Pet., 95.)

The distinction in the two classes of cases is not only founded in reason, but exists in the very nature of things. It may be safely assumed, when such circumstances exist in connection with a deed as not only to give it an apparent validity, but to enable the grantor to make out a *prima facie* title under

Clark, et al. v. The Covenant Mutual Life Insurance Co.,

it, a cloud is created. In showing title under a deed by the grantee himself, or in showing that the deed constitutes a cloud upon another's title, it is necessary to show some sort of title, either real or apparent, in the grantor. The fact however is very material as to the manner in which the title of the grantor is shown. If a grantee in deed, void for some reason not appearing upon its face nor in any of the previous deeds, is able to show a regular chain of conveyances down to his immediate grantor, then no one would doubt that the deed constituted a cloud upon the title. But if in the investigation, in tracing back the title, a defect appears upon the record, then it is evident there is no cloud, for the face of the record furnishes the means of detecting the error, and apprising parties of the true state of the title. Now to which class does this case belong? The plaintiff had a good and complete title to the premises, regularly recorded. Some one impersonating her, and in her name, executed a deed of conveyance to another. This deed was placed upon record. It then showed an apparent title in her supposed grantee. And although a forgery and utterly worthless, it was a cloud, and could only be removed by invoking the aid of extrinsic evidence. Whilst it was permitted to remain it obscured the title, and had a tendency to prevent the plaintiff from using and disposing of her property. Nor does it make any difference that the forged deed was void, because it showed that plaintiff's husband was not joined as a grantor. The record did not show that she was a married woman, and in order to avoid the deed under any circumstances it would have been necessary to show by extrinsic evidence that fact. There was nothing of record to show its invalidity, and therefore a suit became necessary. There was sufficient equity stated in the bill to entitle the plaintiff to relief.

Judgment affirmed. All the Judges concur, except Judge Sherwood, who is absent.

Carpenter v. Rynders.

JAMES M. CARPENTER, Respondent, *vs.* JOSEPH RYNDERS, Appellant.

1. *Practice, civil—Supreme Court—Reversal—Improper evidence.*—This court will not reverse a case on account of the admission of improper evidence, when such evidence cannot have prejudiced the case of the appellants.
2. *Broker—Real estate—Commissions—Default of owner.*—A broker, who negotiates a sale of real estate is entitled to his commissions, though, owing to the default of his employer, the sale is never effected.

Appeal from St. Louis Circuit Court.

Fisher & Rowell, for Appellant.

Title cannot be shown by experts. (30 Mo., 310; 28 Mo., 407; 28 Mo., 496; 24 Mo., 113; 9 Mo., 603; 1 Greenl. Ev., § 441.)

D. Breck Ramsey, for Respondent, cited: *Bailey vs. Chapman*, 41 Mo., 538.

VORIES, Judge, delivered the opinion of the court.

This action was brought before a Justice of the Peace to recover the amount of an account filed for commissions for the sale of a house and lot on McLure Avenue. A trial was had before a Justice, where the defendant recovered a judgment.

The plaintiff appealed to the St. Louis Circuit Court, where on a trial anew, he recovered judgment for \$75; from this judgment defendant appealed to General Term, where the judgment rendered at the Special Term was affirmed, and the defendant appealed to this court.

The facts shown by the record are, that plaintiff is a real estate agent, and that as such the defendant employed him to make sale for him of a house and lot at the price of six thousand dollars. There is some conflict in the evidence in reference to the exact terms of the contract, but the evidence tends most strongly to show that plaintiff undertook to sell the house and lot for 2 1-2 per cent. on the price, and that the plaintiff was to also write the deed without further charge, and that nothing was to be charged unless plaintiff made a sale. The evidence further shows, that the plaintiff did effect a sale of the property, which was satisfactory to the defend-

ant, and that one hundred dollars of the purchase money was paid to defendant as part payment; but that when the defendant was about to make the deed, the purchaser upon examination found that the defendant's title to the lot was defective. The defendant after this proceeded to the State of Ohio and obtained deeds which perfected his title, but that in this time the purchaser made different arrangements, and refused to take the house and lot. That upon consultation between plaintiff and defendant, the hundred dollars paid was returned to the purchaser. The purchaser testified, that he bought the lot in good faith, and would have taken it and paid for it, if the title had been good, or if defendant could have perfected his title before he had made other arrangements about the purchase of property. Mason the purchaser, during his examination as a witness, stated amongst other things, that after he had made the trade with Carpenter, he saw Rynders and talked it all over; he then made an examination of the title and found it bad, that Rynders had no title at all as it stood. This testimony was objected to by the defendant, as incompetent and secondary. The objection was overruled, and the defendant excepted. At the close of the evidence, the court at the instance of plaintiff instructed the jury as follows: "If the jury believe from the evidence, that the plaintiff James M. Carpenter was a real estate agent and broker in the City of St. Louis, and that as such he was employed to sell the real estate in question for \$6,000; that he found a purchaser, negotiated a sale, and that the purchase was not completed between the purchaser and defendant on the ground that the title was defective, which defect in the title was not known to the plaintiff at the time he undertook the sale of said property, and he, the said plaintiff, did all he could in the performance of his undertaking, and was prevented from accomplishing the sale, only by the defect of the title, and that the amount charged was a reasonable compensation for such services, they will find for the plaintiff."

To the giving of this instruction the defendant objected and excepted.

The court then at the instance of the defendant instructed the jury as follows: "If the jury find from the evidence, that the plaintiff knew the imperfection in the title to defendant's property at the time he undertook to sell the same, or before the transaction with Mason, he cannot recover in this case."

After the rendition of the verdict by the jury, the defendant filed his motion to set aside the verdict and grant him a new trial, setting forth as grounds of his motion, that improper evidence had been admitted, that improper instructions had been given, that proper instructions had been refused, and that the verdict was against the law and the evidence.

This motion being overruled, the defendant again excepted.

The court then rendered a final judgment against the defendant for the amount of the verdict, from which an appeal was taken to the General Term of said court, where the judgment of Special Term was affirmed, and from which the defendant appealed to this court.

The first point made by the defendant in the argument in this court as a ground for reversing the judgment in this case is, that the court permitted witness Mason to testify on the trial that defendant had no title to the land charged to have been sold to Mason by the plaintiff. It is contended that the want of title could only be proved by the production of title papers, so that the court as a matter of law could say whether there was title or not. It is very true, that the title to land is usually to be proved by the title papers, and that experts would not be permitted to testify as to the legal effect of a deed, but that was not done in this case. The witness testifies, that it was found that defendant had no title to the lot; he does not state this as an expert, but as a fact, and it might be that the very reason why he had no title was, because he had no title papers to produce. It was however, stated in this case, that the only title that defendant had, was by virtue of the purchase of a title of his brother to the lot under a deed of trust given by his brother in his lifetime, and who had before the purchase died, and that defendant was his administra-

tor at the time he purchased. This was a statement of the facts and not an opinion of an expert. But the answer to this whole question is, that there was no dispute about the defect in the title of defendant to the lot. The defendant himself states that he went to Ohio afterwards, and got deeds which perfected his title to the lot, and there is nothing in the case to dispute or controvert this fact. In such case, even if the witness had given his opinion as to the title, it could not have prejudiced the defendant, and the judgment would not for that reason, be reversed. (*Whittlesey vs. Kellogg*, 28 Mo., 404.)

The instructions given in this case were proper, and fairly placed the case before the jury.

The plaintiff had undertaken to sell defendant's lot for a commission; he negotiated a sale, which was satisfactory to the defendant. The defendant must of necessity make the deed and convey the lot. This he failed to do. The plaintiff had done all that could be done by him, and if the contract and sale were defeated by the fault of the defendant, the plaintiff having done everything on his part that he could do is entitled to his pay. This case comes exactly within the principle of the case of *Bailey vs. Chapman*, 41 Mo., 536: see also, 21 Barb., 145.

There were a number of other instructions asked for by the defendant, which were refused, some of which were perhaps abstractly proper, but the principles contained in them were either covered by the instructions given, or not sustained by the evidence, or not applicable to the evidence in the case.

And the case having been fairly presented by the instructions given, no further notice will be taken of the instructions refused.

Judge Sherwood not sitting. The other Judges concurring, the judgment of the Circuit Court is affirmed.

ARNOLD DIERMEYER, Respondent, vs. FRED. W. HACKMAN,
Appellant.

1. *Estoppel—Creditors—Partnership—Debt of one partner—Deeds of compositions.*—A co-partnership conveyed all their assets to trustees for the benefit of their creditors, in pursuance of a resolution adopted at a meeting of the creditors. At that meeting a creditor of one of the partners was present, and by consent of all, his debt was admitted as a partnership debt. *Held*, that the creditors were afterwards estopped to deny that that debt was a partnership debt.
2. *Deeds of composition—Releases—Validity—Creditors.*—Deeds of composition and releases, in the absence of fraud towards any creditors, are legitimate and should be upheld by the Courts.

Appeal from St. Louis Circuit Court.

H. A. Clover, for Appellant.

I. There was sufficient legal consideration for the execution of the agreement by the plaintiff.

II. The indorser of a promissory note is discharged from any liability thereon by any valid agreement between the holder and the maker, whereby the holder accepts a composition in discharge of the maker. All other parties to the note who have remedies over against the maker are discharged. (Edwards on Bills, 294; Story on Bills, Cap. XI, §§ 424, 425, 426; Bayley on Bills, 2 Am. Ed., 357.)

III. If the creditor, with knowledge that one of the makers of the note is a surety, agree with the principal to give day of payment, without the consent of the surety, the latter is thereby discharged. (Grafton Bank vs. Kent, 4 N. H., 221; Bank vs. Woodward, 5 N. H., 99; Webster vs. Atkinson, 4 N. H., 21; Rees vs. Barrington, 2 Ves. Jr., 540; 3 B. & P., 363; Chitty on Bills, 408, 412; 6 Jur. 889; 2 Keen, 638; 3 Y. & Coll., 187; 3 Madd. 221; 6 Dow. 233; 3 Merivale, 272; 18 Ves. 20; 11 Ves. 410; 6 Ves. 734; 2 Ves. Jr., 543; 2 Ves. Jr., 539; 2 Bro. C. C. 579. Barbour's Dig. Title. Principal and Surety; II Theobald, Principal and Surety, 117, 138. Cooper's Justinian 463 n; Am. Bk. vs. Baker, 4 Met. 164; See Note-2, to Rees. vs. Barrington, 2 Ves. 540; Story on Partnership § 168; Co. Litt. 232 a; Bac. Abr. "Release" (g); Rawley v.

Diermeyer v. Hackman.

Stoddard, 7 Johns. 207; Shep. Touch. 335; Co. Litt, W. 237.)

IV. Whenever a creditor has accepted a composition in discharge of the principal debtor the surety is thereby also discharged. (Ex parte Wilson, 11 Ves 411; Ex parte Smith, 3 Brown 1.)

V. The instructions given were inconsistent and contradictory.

Hitchcock, Lubkee & Player, for Respondent.

An accord to be effective and a bar, must be advantageous to the creditor, and he must have an actual benefit therefrom which he would not otherwise have had. (Bouv. Law Dict. Vol. I "Accord"; 2 Sto. on Cont. § 982.) The creditor must be legally entitled to such advantage. It must be something which he can make available or enforce. (Case vs. Barber, T. Raym., 450.)

"An agreement in order to be an effectual plea in bar, must be executed and satisfied with a recompense in fact, or with an action or other remedy to execute it and recover a recompense." (Coit vs. Houston, 3 Johns. Cases, 249; Story on Contracts, Vol. II, § 982; 1 Com. Dig. "Accord." B. 4; Cartwright vs. Cooke, 3 B. and Ad. 701; Bayley vs. Homan, 3 Bing. N. S., 915; Babcock vs. Hawkins, 23 Vt., 561.)

ADAMS, Judge, delivered the opinion of the court.

This action was founded on the following promissory note.

"St. Louis, Mo., May 7th, 1863.

Six months after notice we promise to pay to the order of Arnold Diermeyer, Eleven Hundred Dollars, for value received negotiable, and payable without defalcation or discount, with interest from date, at the rate of eight per cent. per annum.

F. W. Henschen & Co."

Indorsed, "F. W. Hackman".

The petition alleges that the note was indorsed by the defendant Hackman, and being thus indorsed was delivered to plaintiff, and this suit is brought against the defendant as indorser and not as a joint maker; whether the indorse-

ment was made simply as a security, or as a guaranty, does not appear from the petition, nor is it material to the controversy here whether the defendant was a joint maker, a guarantee, or simply a security.

The defense set up is, that there was a release of the makers, which it is alleged operated as a release of the defendant, growing out of the following state of facts.

On the 15th day of November, 1869, the plaintiff was the holder of the note sued on, the makers thereof being Frederick W. Henschen and Frederick H. Krite, composing the firm of F. W. Henschen & Co. There was also another firm under the name and style of Henschen, Krite & Co., composed of the said Frederick W. Henschen, Frederick H. Krite, and Frederick Perschbacher.

On the 15th day of November, 1869, the said firm of Henschen, Krite & Co. being unable to pay their debts, their creditors had a meeting, in which the plaintiff participated, it being assumed on all hands, that his debt against two of the members of the firm should be counted as a debt of that firm and provided for accordingly. Thereupon all of said creditors including the plaintiff agreed upon and signed the following writing:

“Resolved, that we the creditors of Henschen, Krite, & Co. will give them a full release of all claims against them and due us, provided said firm will convey to trustees agreed upon, the will, contents and other effects of said firm, said trustees to execute a bond to said firm for the honest and faithful appliance of the assets to the payment *pro rata* of all debts, said trustees to have full power to settle all claims, and to sell or defer the selling of the real estate as they may deem expedient for the interest of the creditors.”

Nov., 15th, 1869. “Resolved, that Vital Jarrot, Charles H. Teichman, and Thomas Triustanly, be the Trustees.”

Afterwards and in pursuance of this agreement, the said firm of Henschen, Krite & Co., did execute and deliver to the said trustees a conveyance of the property and effects referred to, upon the terms of said agreement and on the trusts

therein stated; which conveyance was executed on the 17th of November, 1869, and there was attached to this conveyance a list of the creditors secured thereby, of whom the plaintiff was named as one for the note sued on; which deed of trust was duly recorded in the State of Illinois, where the property was situated, and the trustees accepted the trust and gave bond, and entered upon their duties and sold and converted the property into money, and declared a dividend and notified the plaintiff of his dividend being to his credit and ready to be paid over to him.

The plaintiff by replication set up, that he signed the alleged agreement, and became a party thereto and to the deed of trust, without knowing it contained a clause of release, &c.

On the trial of the case evidence was given tending to show that the plaintiff's name was signed as alleged by him, and evidence to the contrary. But no question is presented on this part of the case, and no further notice will be taken of it.

The case was submitted to the Court for trial, and after the evidence was closed, the Court at the instance of the plaintiff, and against the objections of the defendant, made the following declarations of law:—

“The Court declared the law to be, that if the co-partnership of Henschen, Krite & Co. were insolvent at the time of the execution of the agreement of release, dated November 15th, 1869, offered in evidence by defendant, then the signing by plaintiff of said agreement was without consideration and the agreement is not binding on him.”

“The Court declares the law to be, that the agreement of release dated November 15th, 1869, and the deed executed in pursuance thereof, offered in evidence, constitute no defense to plaintiff's cause of action.”

At the instance of the defendant the Court declared the law as follows :

“The Court declares the law to be, that if the plaintiff executed the agreement of release of November 15th, 1869

and consequently upon the execution of said agreement the parties Henschen, Krite & Co., the makers of the note sued on, executed the deed of the same date given in evidence, whereby the property therein mentioned was conveyed to trustees therein named to pay and discharge in full, if there be sufficient means for that purpose, the debt and liability arising upon the note sued on, among others, and that said trustees have executed the trusts of said deed, then the plaintiff cannot recover upon said note as against the defendant the indorser thereon."

The Court thereupon found for the plaintiff the amount of the note and interest, and gave judgment accordingly.

The defendant filed a motion for a new trial on the ground that the law as declared by the Court for plaintiff was erroneous, and inconsistent with the declaration given for defendant.

The Court overruled this motion, and defendant excepted, and appealed to the General Term, where the judgment at Special Term was affirmed, and the defendant has appealed to this Court.

There seems to be a manifest inconsistency in the declarations of law given for the plaintiff and defendant. The one given for the defendant misdescribes the note in referring to it as having been executed by Henschen, Krite & Co., as the makers thereof, whereas it had only been executed by two of the members of that firm. This no doubt was an oversight or clerical error.

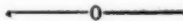
The truth was, that the creditors of Henschen, Krite & Co., and all the parties to the agreement of release and the composition deed, treated this note as a debt of that firm, and although it was not in point of fact a debt of the firm, it was counted as one in that transaction, and must be considered as such "*pro hac vice*." After the creditors of Henschen, Krite & Co., had thus agreed to let that debt come into the deed, and after the deed had been executed on the faith of this understanding, they would be estopped to deny that this debt was to share its part of the proceeds of the trust property.

Therefore if those transactions amounted to a release of the real debts of Henschen, Krite & Co., secured by the trust, this debt certainly ought to share the same fate. For the plaintiff was thus allowed to share in assets which would otherwise have been beyond his reach.

There is no question of fraud as to creditors raised here; all the creditors are parties, and agreeing to the release and deed of trust. The grantors were not bound to make the deed, nor could they have voluntarily made the deed and required a release. The creditors as a matter of right, could not require the debtors to part with their control over their own property. The creditors preferred to have the property transferred to trustees for the payment of their debts, rather than to rely any longer on the personal responsibility of their debtors; and to attain this end they were willing to release their debtors and look alone to the property for payment. Such deeds of composition and release, where there is no fraud as to the other creditors, are legitimate transactions, and ought to be upheld by the Court.

Under this view, the declarations of law given for the plaintiff should have been refused. The one given for the defendant if properly modified might stand.

For these reasons the judgment will be reversed and the cause remanded. The other Judges concur.



EDWARD J. GAMACHE, Appellant, *vs.* HENRY GAMBS, Admr.
of W. M. PROVOST, *et al.*, Respondents.

PER CURIAM, JUDGE EWING, DISSENTING.

1. *Wills—Establishment of—Witnesses—Beneficiaries competent.*—Beneficiaries under a will being parties to the action, are competent witnesses in establishing it. [Garvin v. Williams, 50 Mo., 206 affirmed.]

Appeal from St. Louis Circuit Court.

Bakewell & Farish for Appellant.

The Court erred in excluding the plaintiff, the legatee, when offered as a witness by appellant. (Shailer vs. Bumstead, 99 Mass., 130; Garvin's Admr. vs. Williams, 50 Mo., 206; Granger vs. Barrett, 98 Mass., 463; Baxter vs. Abbott, 7 Gray, 82; Gay vs. Gay, 5 Allen, 157; Looker vs. Davis, 47 Mo., 141; Mass. Rev. Stat., 1860, 672.)

Lackland, Martin and Lackland, for Respondents.

The testimony of the beneficiary in a will to acquit himself of the charge of practising a fraud or undue influence on the mind of Prevost to procure the will, was incompetent.

The statute says: "Where one of the original parties to the contract or cause of action in issue and on trial is dead, or shown to be insane, the other party shall not be admitted to testify in his own favor."

The question then is, what is the cause of action in this suit to establish the will of Prevost, to which there were original parties or actors? A cause of action is any matter for which an action may be brought. (1 Bouvier Dic., 247.) The defendants state that the paper is not Prevost's will, for the reason that it was obtained by fraud and undue influence practised by plaintiff himself, upon Prevost in his life time. The issue and cause of action which is distinctly presented by the pleadings, is whether Prevost was imposed upon, and defrauded *in his life time* by plaintiff. If defendant's allegations are true, then the testator Prevost was the victim of the fraud and undue influence, and was therefore an original party to the cause of action, and the plaintiff the fraudulent procurer of the paper, the other party to the cause of action.

A will is a transaction between the deceased and the devisees as much as if it was a deed and not a will, (Garvin vs. Williams, 44 Mo., 471,) and so all authorities agree. If then, there is no difference in the rules of dealing with fraud in procuring a will, and fraud in procuring a deed, the rule of evidence should be the same. If this were a suit to cancel a deed by Prevost, the cause of action would be the fraud in procuring it. In such a case the grantee would not be a competent witness, Prevost being dead.

A party to a cause of action is incompetent for any purpose whatever, if the other party is dead.

The following cases contain a great variety of illustrations of a party's incompetency, where a contract with a deceased party is involved in the determination of the suit: *Brown vs. Brightman*, 11 Allen, 226; *Stanton vs. Ryan*, 41 Mo., 510; *Parson vs. Parson*, 45 Mo., 268; *Johnson vs. Quarles*, 46 Mo., 429; *State ex rel. Townshend vs. Meagher*, 44 Mo. 363. See also (*Hollister's Admr. vs. Young*, 42 Vt., 403; *Merrill, Admr. vs. Pinney*, 43 Vt., 606; *Fitzsimmon vs. Southwick*, 38 Vt., 509; *Smith vs. Smith*, 1 Allen, 231; *Byrne vs. McDonald*, *Id.*, 293; *Hubbard vs. Chapin*, 2 Allen, 328; *Fisher vs. Morse*, 9 Gray, 440; *Woodrow vs. Mansfield*, 106 Mass., 112; *Merrill, Admr. &c. vs. Brown*, 43 Vt., 605; *Ayres, Admr. vs. Ayres*, 11 Gray, 130; *Timon vs. Claffy*, 45 Barb., 438; *Dyer vs. Dyer*, 48 Barb., 190; *Van Alstyne vs. Van Alstyne*, 28 N.Y. R., 375; *Stephens vs. Hartley*, 13 Ohio St., 531; *Hollister's Admr. vs. Young*, 41 Vt., 159; *Little vs. Little*, 13 Gray, 266; *Ford's Exr. vs. Cheney*, 40 Vt., 155; *Ela, Exr. vs. Edwards*, 97 Mass., 318; *Granger vs. Bassett*, 98 Mass., 468.—*Shailer vs. Bumstead*, 99 Mass., 130 is evidently not a well considered case and is contrary to prior decisions in that State. It says there was no cause of action till the death of the testatrix. But action and cause of action are different things. When suit was brought the cause of action reached back to the fraud and influence, which took place before the death. That case was ruled on the idea that there was a difference between a will and a deed, which idea is overthrown in *Garvin vs. Williams*, 44 Mo. 477.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff was the devisee in the will of William M. Prevost, and presented the will for probate in the St. Louis County Probate Court, where it was rejected.

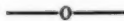
He then filed his petition in the Circuit Court to have the same established. On the trial he offered to testify as a witness and his evidence was ruled out on the ground that he

Partnership Estate of Henry Ames & Co.,

was incompetent to be introduced for that purpose. His rejection as a witness constitutes the only error complained of.

The precise question here raised was decided by this Court, at its October Term, 1872, in the case of *Garvin vs. Williams*, where it was held that in an issue to try the validity of a will, the beneficiaries under the will being parties to the action are competent witnesses in favor of the will. The real question in such a case is, whether there is a will or not, and upon that question all the parties have a right to testify.

That case is decisive authority, and the judgment must be reversed and the cause remanded. The other Judges concur except Judge Ewing.



IN THE MATTER OF PARTNERSHIP ESTATE OF HENRY AMES & Co.
LUCY V. SEMPLE AMES, Administratrix, Apellant.

1. *Administration—Assets—Situs.*—In administration the real *situs* of the assets is, where the debtor resides and the assets are located.
2. *Administrator—Authority of—Foreign State.*—The authority of an administrator does not extend beyond the limits of the Government granting the letters unless the foreign law controlling the assets permits it.

Appeal from St. Louis Circuit Court.

Glover & Shepley, and Hitchcock, Lubke and Player, for Appellants.

If these are assets of the firm of Henry Ames & Co., this being the home of the domicile, it is competent for the administrators of the surviving partner, in charge of said partnership of Henry Ames & Co., to make distribution or sell the assets of that partnership in another State. (*Redfield on Wills*, 20; *Wilkins vs. Ellet*, 9 Wall., 740; *Vroom vs. VanHorne*, 10 Paige, Ch. 549; *Schultz vs. Pulver*, 11 Wend., 361; *Williams vs. Storrs*, 6 John Ch., 353.)

As Mrs. Ames is the purchaser and does not object to the position she is in, and is willing to run the risk there is no reason why the sale should be rejected. The contestants were present at the sale and made no objection to it.

Partnership Estate of Henry Ames & Co.,

The whole question is discussed and the recent decisions commented on in 2 Am. Law Review pp. 1-24, 193-205.

Sharp & Broadhead, for the Executors of Henry Ames, deceased.

Laws have no force *propria vigore* beyond the Territory of the State by which they were made. (*Minor vs. Cardwell*, 37 Mo., 350.) "The letters of a foreign executor have no extra-territorial force, and give him no title to the property of the testator in this State." (*Naylor's Adm., vs. Moffatt*, 29 Mo. 126; *Vaughn vs. Northup*, 15 Peters, 5.) Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the Government which grants it, and does not *de jure* extend to other countries. (*Fenwick vs. Sears*, 1 Cranch., 259; *Dixon's Exrs. vs. Ramsey's Exrs.* 3 Cranch., 319; *Kerr vs. Moon*, 9 Wheaton, 565; *Noonan vs. Bradley*, 9 Wallace, 404.)

It has never been held that the *Administrator* can pass the title to property in another State or assign a chose in action so as to authorize this assignee to sue. (*Stearns vs. Burnham*, 3 Green. Maine, 261; *Goodwin vs. Jones*, 3 Mass., 513; *Young vs. O'Neil*, 3 Sneed. Tenn., 55; *Trecothick vs. Austin*, 4 Mason, (Cir. Court), 35.)

ADAMS, Judge, delivered the opinion of the court.

Prior to August 14th, 1866, Henry and Edgar Ames were co-partners under the firm name of Henry Ames & Co., doing business as pork packers and commission merchants in the City of St. Louis, Missouri, where both partners resided, and continued to reside during their lives. On the 14th of August, 1866, this firm was dissolved by the death of Henry Ames. The surviving partner Edgar Ames took out letters from the Probate Court of St. Louis County on the partnership estate, and continued this administration up to the time of his death in December 1867. After his death his widow Lucy V. Semple Ames, being qualified as administratrix of his estate in the same Probate Court, also gave bond and was authorized to

Partnership Estate of Henry Ames & Co.,

take charge of the partnership estate remaining unadministered, and to make settlement thereof. The partnership estate consisted of a large amount of assets belonging to the firm in the State of Missouri, and the firm of Henry Ames & Co. also had large assets as members of other firms in the State of Mississippi, consisting of outstanding accounts and debts due the Mississippi houses from debtors residing in that State. Mrs. Ames, as administratrix of the surviving partner and of the partnership effects, had charged herself with all the home assets, and also with the Mississippi or foreign assets. These charges were separately and distinctly made in her reports, distinguishing the home assets from the foreign.

Desiring to make a final settlement, she thus presented her accounts for that purpose, and with a view to such settlement an order was procured from the Probate Court to the effect, that she "do sell at public auction at the Eastern door of the Court House of the County of St. Louis, prior to the first day of the next term, the uncollected personal effects of said partnership, as set forth in said settlement, first giving notice of said sale by publication in the Missouri Republican and Missouri Democrat for 20 days prior thereto, and that she make report at the next term of this Court."

Under this order Mrs. Ames as Administratrix sold all the uncollected accounts and debts domestic and foreign, and became the purchaser herself of all the foreign assets at amounts greatly below their nominal value. This sale was conducted through an auctioneer; the respondents were present at the sale and made no protest or objection in regard to the manner in which the sale was conducted.

When Mrs. Ames filed her report of sale, the respondents filed a motion, asking the Court to reject and set aside the sale of the Mississippi assets, upon the ground, that the order of sale was not broad enough to cover the assets, and that the Probate Court had no jurisdiction to order the sale thereof. The Probate Court, on hearing the report of sale and respondents' motion, confirmed the sale in all respects except in regard to the foreign assets, and the sale of the foreign

Partnership Estate of Henry Ames & Co.,

assets was disapproved and declared a nullity. From this order of disapproval Mrs. Ames took an appeal to the Circuit Court, where the action of the Probate Court was affirmed, both at Special and General Term, and she has appealed to this Court.

The only material point in this record is, whether the Probate Court of St. Louis County had any jurisdiction over the foreign assets belonging to the firm of Henry Ames & Co.

It may be concluded and no doubt is true, that during the life-time of the surviving partner he had control of the foreign assets, and that by fiction of law such assets, for many purposes, had no real *situs*, but followed his person and were subject to his disposition without regard to his locality. The question here, however, is a question of jurisdiction over such assets after the death of the surviving partner. In such case fiction gives way to truth, and the real *situs* can and must be inquired into. In regard to administrations, the real *situs* is the place, where the debtor resides and the assets are located. The authority of the administrator is local and cannot extend beyond the limits of the Government granting the letters, unless the foreign law controlling the assets permits it. There is nothing in this record to show that there was any law in Mississippi authorizing the Missouri administratrix to act in that State.

The law seems to be well settled, that an administrator has no authority to transfer assets, except such as have their *situs* within the territorial limits of the Government granting his letters.

This point was determined by this Court in *McCarty vs. Hall*, 13 Mo., 480, where the authorities were reviewed at some length, and we see no reason for departing from the doctrines laid down in that case. See also *Nayler's admr. vs. Moffat*, 29 Mo., 126; *Minor vs. Cardwell*, 37 Mo., 350.

The learned counsel for appellant admits that as a general rule the propositions here laid down are correct, but denies they have any application, under our administration laws, to the case of a surviving partner. He contends, that because

the surviving partner himself in his life time could have transferred the foreign assets, his administratrix, administering the partnership effects under our statute laws, has the same power over the foreign assets. But it must be recollected, that the administratrix derives her authority from the laws of Missouri alone, which have no extra territorial force.—Under her letters she can administer the assets located in Missouri, but has no power to touch the Mississippi assets. They belong to another jurisdiction, over which the State of Missouri has no control.

I see no reason for disturbing the judgment. Let it be affirmed. Judge Sherwood absent, the other Judges concur.

—o—

EMPIRE TRANSPORTATION Co., Appellant *vs.* ANGELO BOGGIANO
et al., Respondent.

1. *Practice, civil, pleadings—Contracts—Counter-claims.*—If the suit is founded on a cause of action connected in any way with a contract, a counter-claim arising out of any other contracts between the same parties, though sounding in damages, may be set up.

Appeal from St. Louis Circuit Court.

C. C. Whittelsey, for Appellant.

The counter-claim was for unliquidated damages, and arose out of a cause of action, different from that set out in the petition. The provisions relating to counter-claim, must be construed in connection with the statute of set-off still in force. (W. S., 1273; *Id.* 1016, § 13; Berdell vs. Johnson, 18 Barb., 559; Vassear vs. Livingston, 3 Kern., 256; Xenia Bank vs. Lee, 7 Abb., Pr. (n. Y.) 372; Johnson vs. Jones, 16 Mo., 494; State to use vs. Modrell, 15 Mo., 421; Mahon vs. Ross, 18 Mo., 121; Pratt vs. Menken, 18 Mo., 158; Brake vs. Corning, 19 Mo., 125.)

In an action for goods sold, defendant cannot counter-claim damages for fraud in the sale of other goods. (Berdell vs.

Johnson, 18 Barb. 559; Johnson vs. Strader, 3 Mo., 359, 366.)

Cline, Jamison & Day, for Respondents.

The defendant's counter-claim is based upon a breach of contract and is not an action of tort.

In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action may be the subject of a counter-claim. (W. S., 1016, § 13.) The cases in 19 Mo., 125; 15 Mo., 424, and 16 Mo., 494, cited by appellant all relate to set-off and were decided before the adoption of the present provisions in reference to counter-claims.

The counsel for appellant and respondent filed elaborate briefs, but as the other points were not touched upon in the decision they are necessarily omitted here.

ADAMS, Judge, delivered the opinion of the court.

This was an action for freight and charges, amounting to three hundred and fifty three 10-100 dollars, on goods transported by the plaintiff as a common carrier from the City of New York to the City of St. Louis, and delivered to the defendants.

The defendants answered, and by way of counter-claim, set up gross and willful negligence of the plaintiff in the transportation of fruit, that had been delivered to plaintiff, and which plaintiff had agreed to transport and deliver to the defendants at St. Louis, and owing to delay and gross negligence the fruit was injured, and the defendants suffered loss by such injury, growing out of delay and the negligence of the plaintiff, in the sum of \$463.

A replication was filed, denying the material allegations of the counter-claims. There was another counter-claim of the same nature set up, but the jury found for the plaintiff on the last counter-claim, and no question is raised here about the propriety of this finding.

The only material question is in regard to the counter-

Empire Transportation Co., v. Boggiano, et al.

claim of \$463, which was allowed by the jury. It is urged here by the learned counsel for the appellant with much zeal and ability, that the negligence of a common carrier being a common law liability and the subject of an action for a tort, cannot be set up as a counter-claim under our practice act. Our statute is very broad and comprehensive in regard to counter-claims. It is provided by Section 13, 2 W. S., 1016, that "in an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action" may be set up as a counter-claim. Although the plaintiff's liability in this case is for a tort growing out of the negligence and delay as a common carrier in the transportation of the defendant's goods, the cause of action so far as the defendant is concerned arises out of the contract of affreightment, and hence in declaring at common law for the tort, the contract was always alleged in the declaration by way of inducement. So under our statute the contract must be alleged as the inducement to the cause of action, and as showing the parties' connection with the case. In this light the contract is looked to as the origin of the cause of action. The statute contemplated, that where a suit is founded on a cause of action connected in any manner with a contract, a counter-claim arising out of any other contract, between the same parties may be set up. The old doctrine of set-offs has no analogy to counter-claims of this nature under our Statutes. Under the old system, set-offs sounding in damages for breaches of contract were not allowed, but this objection cannot be maintained in regard to counter-claims under our present code of practice. It is sufficient if the defendant's right to the damages relied on as a counter-claim grows out of a contract, between him and the plaintiff.

The instructions given on both sides fairly presented the case to the jury, and I see no reason for disturbing the judgment.

Judgment affirmed. Judge Sherwood absent. The other Judges concur.

 Budd, et al. v. Hoffheimer.

GEORGE K. BUDD, *et al.*, Respondent, *vs.* ISAAC HOFFHEIMER,
Appellant.

PER CURIAM, JUDGE EWING, DISSENTING.

1. *Practice, civil, trials—Pleadings—Evidence—Instructions.*—If the evidence shows a different state of facts from those contained in the pleadings, and a party to the suit desires instructions in accordance with those facts, he must first amend his pleadings by leave of court.
2. *Practice, civil, trials—Instructions, not covering all the issues.*—An instruction, calling for a verdict yet not covering all the issues in the case, is objectionable, unless cured by other instructions.
3. *Practice, civil, trials—Instructions—Amount of verdict.*—When a party sues under a contract for the amount of compensation fixed by the contract, an instruction that the verdict be for that amount, if the jury find for the plaintiff, is correct.
4. *Practice, civil, trials—Evidence—Links in the chain of testimony.*—Evidence that may form a link in the chain of testimony should be admitted, though not sufficient in itself to establish the defense, and although no disclosure is made at the time of an intention to prove the additional facts to establish the defense.
5. *Practice, civil, trials—Evidence, conflicting—Admissible testimony rejected—New trials.*—When in a case where the evidence is conflicting, the court excludes admissible testimony, but afterwards upon re-assembling after a recess, decides to admit it, but the witness does not appear, and it does not appear that the party had any opportunity to supply this testimony, the motion for a new trial should be granted.

Appeal from St. Louis Circuit Court.

Slayback & Heaussler, for Appellant.

I. Evidence that may be a link in a chain of testimony, should not be excluded, although such evidence may not be sufficient of itself to establish such defense. (*Platt Co. vs. Marshall*, 10 Mo., 345; *Lane vs. Kingsberry*, 11 Mo., 402.)

II. Although the courts will not interfere with the verdicts of juries on the ground that they are against the weight of evidence, yet, when hard cases appear to rise under the operation of this rule, it must be satisfied that the instructions are entirely unexceptionable. (*Carrol vs. Paul*, 16 Mo., 226.)

III. Instructions which cover the whole case ought to be so framed as to meet the points raised by the evidence and pleadings on both sides. (*Fitzgerald vs. Hayward*, 50 Mo., 516.)

A jury is not obliged to take a judge's view of the evidence. *Carrol vs. Paul*, 16 Mo., 242.

Budd, et al. v. Hoffheimer.

Instructions must be so given, as substantially to embrace the whole point of the case presented, though this need not be in the words asked. (44 Mo., 91; 26 Mo., 523; 6 Mo., 267-279; 27 Mo., 26-55-70.)

Where there is the least evidence direct or inferential to support an issue, it is error to refuse instructions submitting the question raised to the jury; and it is equally erroneous to give instructions which withdraw such a point from the consideration of the jury, or which assume the facts to be proved. (34 Mo., 98, 461; 18 Mo., 170-171; 24 Mo., 223; 42 Mo., 60; 19 Mo., 360; 13 Mo., 80; 5 Mo., 110; 6 Mo., 64; 16 Mo., 496; Mead vs. Brotherton, 30 Mo., 201; Kinman vs. Cannefax, 34 Mo., 147; Bradford vs. Pearson, 12 Mo., 71; Flournoy vs. Andrews, 5 Mo., 513.)

Wm. B. Thompson, for Respondents.

VORIES, Judge, delivered the opinion of the court.

This action was brought in the St. Louis Circuit Court by respondents, who it seems were brokers and followed the business of procuring loans of money for such persons as applied to them for said purpose, for a commission to be paid therefor.

It is charged in the petition, that on the 8th of April, 1869, the appellant by a writing filed with the petition, contracted with the respondent to procure for him, \$20,000 on the real estate of appellant, situate on Main and Second Streets in the City of St. Louis, upon which was situate at the time a three and one-half story brick distillery, &c., also another lot of ground named in the petition; that the appellant by said agreement agreed to pay respondents for procuring said loan a commission of ten per cent. on said sum of \$20,000; that by said agreement appellant contracted to pay said commission of ten per cent. on said sum of \$20,000, if from any circumstances the money was not taken by him within three days after he had been notified by the respondents that the loan was granted; that appellant was notified that said loan had been granted on his said application upon the property offered by said

appellant as security therefor, and upon the terms agreed on; that appellant did not take said loan of \$20,000 in the time agreed on; that he took and received \$2,500 of said sum and paid the commission therefor, but then refused to take any further sum thereof, and has never taken the same nor paid the commission therefor; that the sum of \$1,750 is due the respondents therefor, for which judgment is asked.

The defendant in his answer admitted that he had signed or executed the paper filed with the petition, but he denied that he by such paper contracted or agreed with the plaintiff to procure for him said sum of money on the real estate named in the petition, or that the said paper had in writing in the body thereof the provisions in reference thereto, as it now appears, when he signed the same; he denied all of the other material allegations in the petition, except that he never did receive said loan or money.

The answer then states the facts to be, that on or about the 8th day of April, 1869, he desired to make a loan for \$5,000 upon some property he owned on Chouteau Avenue in the City of St. Louis, and applied to one J. Hartman (who negotiated loans) for a loan of said sum; that said Hartman agreed to obtain said loan for the usual commissions, that at said time he informed said Hartman, that he might purchase the property set out in plaintiffs' petition, situate on Main and Second Streets, and upon which the distillery was situated, and that if he should make said purchase he would like to obtain a loan of \$20,000 on the property so to be purchased; that Hartman then requested defendant to sign the papers filed with plaintiffs' petition; that the said papers were then in blanks in their printed form, not filled up with any writing as at present, and that he had a distinct understanding with Hartman before signing the papers, that he did not own the property on Main and Second Streets, and did not want and would not take said loan of \$20,000, unless he made a purchase of said property, which he avers that he never did, and therefore never desired said loan.

The answer further states that the defendant afterwards

made an arrangement by which he procured the loan of five thousand dollars referred to, by giving as security a lien on property in addition to the property first named on Chouteau Avenue, and that the loan so obtained is what plaintiff refers to as being an acceptance of \$2,500 of said sum of \$20,000; that defendant never purchased the said property on Main Street; that no loan was ever made to him, nor was any loan offered to him as set up in the petition, nor was his agreement filed with the petition ever to have any force or effect until he did make such purchase; that the said plaintiffs were fully aware and informed of the agreement between defendant and Hartman when they received said contract or paper filed with their petition, and well knew that defendant signed the same in blank, &c.

The plaintiffs and respondents filed a replication, denying in general terms the affirmative allegations set up in the answer. A trial was had in the Circuit Court, where the respondents recovered a judgment for the full amount of the demand in their petition. The defendant filed a motion for new trial, which being overruled he excepted and appealed to the court at General Term where the judgment at Special Term was affirmed, and from which appellant appealed to this court.

The bill of exceptions shows that the evidence on the trial was conflicting. The testimony of one of the plaintiffs and Hartman, their witness, tending to prove the allegations of plaintiff's petition, while the evidence of appellant and Campbell, his witness, tended to prove the facts constituting the defendant's defense and to disprove and contradict the evidence on the part of the plaintiff.

The defendant, while he was cross-examining the witness Hartman (who was introduced by plaintiffs and was the active agent in procuring the contract sued on), asked said witness the following questions:

"Q. Was it known to you and to Mr. Budd at the time this application was made for the loan of \$20,000, that Mr. Hoffheimer did not claim to be the owner in fee simple of that distillery, and the ground that it was on?" This question was

objected to by the plaintiff, and the objection sustained by the court, and the answer to the question excluded, to which ruling the defendant excepted.

The defendant then asked said witness this further question: "Q. Was not the fact communicated to the plaintiffs in this case before this application was signed, that the defendant in this case was not the owner of the distillery?" This question was also objected to, and the objection sustained, and the defendant excepted. After the evidence was closed the court (notwithstanding the objection of the defendant) at the request of the plaintiffs, together with other instructions, instructed the jury as follows:

1st. "The jury are bound to find their verdict for the plaintiffs for the sum of seventeen hundred and fifty dollars and interest at the rate of six per cent. per annum from the date of the institution of this suit, if they believe from the evidence, that the plaintiffs procured a loan of twenty thousand dollars for defendant, and so notified the defendant, although the defendant may not have availed himself of said loan so procured, unless the jury find from the evidence, that the contract marked Exhibit "A" was signed in blank by the defendant and afterwards filled up, the burden of proving which to the satisfaction of the jury is upon the defendant."

2nd. "The jury are instructed, that the burden of proof lies upon the defendant to show, that the contract sued on was executed by him under an agreement made with plaintiff at the time, that he was not the owner of the property described in the contract marked Exhibit "A" on Second and Main Streets, and that such contract was not to be enforced, if he did not purchase the property, and that the agreement was made at the time of executing the contract."

The defendant at the time excepted to the opinion of the court in overruling his objections to these instructions.

The court at the request of the defendant instructed the jury as follows:

9. "Unless the jury believe from the evidence, that plaintiffs, as agents of defendant, agreed to procure a loan of

\$20,000 on the real estate of defendant on Main and Second streets, and the lot of ground in Block 470 of the City of St. Louis, on Chouteau Avenue, set out in the petition, and unless the jury believe from the evidence, that said loan was actually obtained by plaintiffs, as the agents of defendant, on the property described in the petition, they will find for the defendant."

10. "The jury are instructed, that if they believe from the evidence that plaintiffs at the time they received papers marked No. 1 and 2, knew or were informed, that defendant did not then own said property, and did not desire any such loan unless he made a purchase of said Main and Second Street property, as set out in No. 1, unless he did purchase the same, then they will find for the defendant."

The defendant then moved the court to instruct the jury as follows:

"If the jury believe from the evidence, that the papers offered in evidence, numbered 222 No. 2, and 215 No. 1, are not parts of one contract, but that the same are detached portions of two several distinct applications for loans, such belief on the part of the jury may be considered by them in weighing the force and effect to which said papers are entitled, and if the jury believe further from the evidence, that said papers relate to separate transactions, then they may be rejected as evidence of either as an entire contract." This instruction was refused, and the defendant again excepted.

The defendant in his motion for a new trial set out as causes for his motion, among the other objections, the opinions of the court excepted to as above stated.

In the investigation of this case there are only two grounds of objections to the action of the Circuit Court which it is material to examine here. The first is, as to the rulings of the court in the giving and refusing instructions to the jury, and second, as to whether the court improperly refused to permit proper evidence offered by the defendant upon the trial of the cause, to go to the jury. The defendant complains that the court refused to give the jury the instruction, by

which he asked the court to tell the jury, if they believed, the papers read in evidence by plaintiff as the contract sued on, were detached parts of two contracts and related to separate transactions, then they might reject said papers as evidence in the cause.

This objection might be well taken, if the pleadings in the cause would authorize it. The instructions should in all cases be predicated on the pleadings and the evidence, and the jury should be directed to pass upon all facts relating to any issue in the cause; but in this case by an examination of the pleadings it will be seen, that there is no such issue made in the case. The defendant in his answer admits the execution of the paper sued on and filed with the petition, but he denies that he contracted thereby as set forth in the petition, and then sets up two objections or defenses to the supposed contract, which are specifically set forth in the answer, and which are, that the contract was not filled up, but was in blank when he signed it, that said contract was delivered conditionally, and that the same was not to be binding on him unless he purchased the distillery property and needed the money, which was so understood by the parties at the time. The execution of the paper is admitted, no plea of *non est factum*, and no reference made to any such defense in the answer. If upon the trial of the cause in such case a state of facts should be made appear, that would justify such an instruction, the defendant should have asked leave to have amended his answer to correspond with the evidence, and then his instruction might have been proper; but as the case now stands, the instruction was properly overruled. (W. S., 1034. § 3.)

Another objection urged by the appellant in this cause to the action of the Circuit Court upon the trial is, as to the propriety of the action of the court in giving the jury the first instruction asked by the plaintiffs. It is contended by the appellant, that this instruction ignores his defense in the cause, that it purports to cover the whole case and the issues therein, while it wholly ignores at least one of the main defenses set up by appellants. This instruction if taken alone is amenable to

said objections; it tells the jury that they must find for the plaintiff in the sum of \$1,750 with interest, unless they find that the instrument of writing sued on was signed in blank, and filled up afterwards, the burden of showing which devolves on the defendant. This wholly ignores the defense set up by the defendant, that the paper was delivered on the condition that it was to have no binding force if he did not purchase the Main Street property, and I do not think that the objection to this instruction is cured by the second instruction given by the court at the request of the plaintiffs. That instruction only tells the jury that the burden of proving that the contract was delivered with the conditions therein named devolves on the defendant, but it fails to inform the jury what effect is to be given to said facts when proved. But in the instruction numbered ten, given on the part of the defendant, the court tells the jury, that if plaintiffs knew or were informed at the time of the execution and delivery of said contract that defendant did not own said property, and did not desire any such loan unless he did purchase the same, then they will find for the defendant. I think that when this instruction, given at the request of the appellant, is taken in connection with the first instruction given for the plaintiffs, they properly present the law upon the issues in this case. The principle contended for by the defendant in reference to said first instruction given on the part of the plaintiffs, being too limited in its scope to present the whole case to the jury, is correct and is sustained by the authorities referred to, (*Sawyer vs. Hannibal & St. Joseph R. R. Co.*, 37 Mo., 240, and cases there cited,) but the instruction is cured in this case by the instruction given for the defendant.

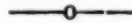
It is however, earnestly contended on the part of the defendant in this case, that the court erred in the first instruction given for the plaintiffs in fixing the measure of damages, if the jury found for the plaintiffs, at seventeen hundred and fifty dollars with interest, &c. That the suit was a suit to recover damages for the breach of a contract in which the damages were not liquidated, and that the damages ought therefore

to be left to the jury. It is a sufficient answer to this objection to say, that this suit is not brought to recover damages for the breach of a contract not performed by the defendant, and from the non-performance of which the plaintiff sustained damages; but it is for the recovery of a compensation charged to be due plaintiffs for services rendered under a written contract, in which the price to be paid to the plaintiffs for their services is fixed by the agreement. In such case, if the plaintiffs show that the services have been rendered and the contract performed on their part, the amount that they are entitled to recover is the price fixed by the contract. The authorities referred to by the defendant are not in point. The remaining point to be disposed of, is as to the ruling of the Circuit Court in excluding the evidence offered by the defendant to prove that it was known by plaintiffs at the time of signing and delivering the contract sued on, that the defendant did not own the distillery property named in the contract. I think that this evidence was material, and ought to have been admitted. The evidence in the cause was conflicting, the plaintiffs and their witnesses having sworn to one state of facts, and the defendant and his witnesses having sworn to a directly opposing state of facts. The evidence excluded would have tended to contradict, and would, if the question had been answered in the affirmative, have directly contradicted, the evidence of the plaintiffs, and might have been sufficient to have turned the scale in favor of the defendant in the minds of the jury, and the answer to the question if it had been in the affirmative would have proved or tended to prove a material fact put in issue by the pleadings.

Evidence that may form a link in the chain of testimony should not be excluded, although it may not be considered sufficient of itself to establish the defense, and this, although at the time, no disclosure is made by counsel of an intention to prove the additional facts to establish the defense. (*Platte County vs. Marshall, et al.*, 10 Mo., 345.) The weight of such evidence should be left to the jury. (*Lane vs. Kingsberry*, 11 Mo., 402.) It is stated in the bill of exceptions, that after the

evidence of the witness, Hartman had been closed, and the court had taken a recess, on the re-assembling of the court it was remarked by the Judge, that after having examined the issues in the pleadings, he thought the evidence rejected would be admissible; that the witness Hartman was then called for further examination, but that he did not appear and never returned. This did not help the case; it does not appear from the bill of exceptions, that defendant ever had any opportunity to supply the evidence rejected. In a case like this, where the evidence is conflicting and contradictory, it is not for this court to say what effect the rejected evidence would have had on the minds of the jury. The Circuit Court ought therefore to have sustained defendant's motion for a new trial, and having failed to do so, the judgment ought to be reversed.

Judge Ewing dissents. The other judges concurring, the judgment of the Circuit Court is reversed, and the cause remanded.



WILLIAM H. BROWN, Respondent, *vs.* NATHANIEL M. HARRIS,
Appellant.

1. *Taxes—Schools—County Clerk—Collector.*—Under the act of 1867, [now changed] in relation to schools, [W. S., (1870) 1265,] it was the duty of the County Clerk to extend the amount of the school tax on the assessment books. The Auditor had no jurisdiction in the matter, and his mandate would not protect the collector in proceeding to collect money, as such taxes.
2. *Officers, ministerial—Courts, mandates of—Responsibility.*—A ministerial officer is protected in executing the mandate of the Court which has power to issue such a mandate.

Appeal from the St. Louis Circuit Court.

Thomas C. Reynolds, for Appellant.

The tax books when regularly certified and authenticated afford the same protection to the collector in collecting taxes therein assessed, that a judgment at law does to the Sheriff in enforcing an execution issued thereon. (*State vs. Shacklett*,

Brown v. Harris.

37 Mo., 284; 47 Mo., 463; 43 Mo., 463; 49 Mo., 482; 50 Mo., 134.)

The revenue acts and the school tax acts, being *in pari materia* taxations, must be construed together and as a whole. We must construe the school act of 1867, to mean that when assigning certain duties to the County Clerk, it meant merely the officer who performed like duties in regard to the State and County revenue: *i. e.* in St. Louis County the Auditor.

Even if the Clerk of the County Court were the proper officer to assess the school taxes, his getting the Auditor to do so for him was a mere technical irregularity not invalidating the tax bill.

B. D. Lee, for Respondent.

The County Auditor had nothing whatever under the law to do with issuing the tax bill or making the assessment for taxes in this case, and there was no justification in the action of the Collector in making the levy; because he was bound to know that the bill was made out by the officer having authority thereto.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff brought his action of trespass against the defendant for taking and seizing a package of bank notes.

The defendant justified the seizure on the ground that he was County Collector at the time and that the notes were taken to satisfy the tax bill in his hands, which had been assessed against the plaintiff for school taxes. This fact was put in issue by the replication. It seems, that the County Auditor extended the tax on the assessments, returned and issued the warrant to the Collector, and that the County Clerk had nothing to do with it. The law in force at the time was the act of 1867. (2 W. S., 1, p. 1265), in relation to schools in cities, towns and villages, the 8th section of which provides, that the same assessment on property, which shall be made from time to time for State and County purposes, shall be deemed and used as the lawful and proper assessment in levy-

ing and collecting the taxes and assessments authorized by this Act; and such taxes and assessments shall be a lien upon and against the property so taxed and assessed, until the same shall be paid off and satisfied. "Said Board shall, on or before the first Monday of April of each year, cause to be certified to the Clerk of the County Court of the County in which said District is situate, the rate of tax levied for the purposes aforesaid for the year, together with the names of the taxpayers residing or owning property within said district and the territory embraced therein; and it is hereby made the duty of said Clerk to extend the taxes, so levied under the provisions of this act, upon the tax book before the same shall be delivered to the County Collector, whose duty it shall be to collect said taxes in the same manner that he is required to collect State and County taxes, &c."

The law then plainly is, that the School Board shall certify to the Clerk of the County Court the rate of tax levied, with the names of the persons residing or owning property within the district, and it is the Clerk's duty to extend the amount of the tax so levied upon the assessment books. This duty is cast upon the County Clerk, and it must be done by him in his official capacity. He, and no other person, is responsible for the manner in which it is done. The Auditor had clearly no jurisdiction over the subject matter, and his precept did not amount to a justification. Had the work been done by an officer vested by law with jurisdiction, although in an irregular manner, the defendant would have been protected, for he would not have been bound to look into the proceedings to see whether it was done in a formal legal way. A ministerial officer will not be responsible for executing the mandate of a Court having power to issue it. But in this instance the Auditor had no jurisdiction, and consequently there can be no protection.

The law has since been changed, and in St. Louis County the duties that devolved upon County Clerks under the school law are now devolved upon the County Auditor. (2 W. St., p. 1250, (1872) § 39). But such was not the law when this case arose.

Heller v. Stremmel.

The judgment was for the plaintiff and it must be affirmed.

The other Judges concur, except Judge Sherwood, absent.

—o—

MICHAEL HELLER, Plaintiff in Error, vs. PHILLIP STREMMEL,
Defendant in Error.

1. *Corporations, municipal—Board of President and Directors of St. Louis Public Schools—County Court of St. Louis County, Justices of—Session Act, approved March 14, 1869, and acts amendatory thereof, construction of—School Districts—Corporations organized for the purpose of education only—The Board of President and Directors of St. Louis Public Schools, school districts and corporations organized for the purpose of education only, are not municipal corporations in the sense of Session Act, approved March 14, 1869, and the acts amendatory thereof, which declare that no person shall be eligible to the office of Justice of the County Court of St. Louis County, who at the time of his election shall hold any office under a Municipal or Railroad corporation created by the laws of the State of Missouri.*

Error to St. Louis Circuit Court.

Sharp & Broadhead, & McCarty, for Plaintiff in Error.

The "Board of President and Directors of the St. Louis Public Schools," is a municipal corporation. It exists as a corporation for the public advantage. (Dillon on Municipal Corporations, 29.)

H. A. Clover, for Defendant in Error.

The Board of President and Directors of the Public Schools is not a municipal corporation within the purview of the law. (2 Kent's Com., 11th Edition pp. 316-321; 4 Wheaton, pp. 634 *et seq.*, 694 *passim*; Dartmouth College vs. Woodward, 1 Sumner, 276, 296, 302, 313; Osborn vs. U. S. Bank, 9 Wheat., 938; Bank of the State of So. Car. vs. Smith's Exr., 3 McCord, 377; U. S. Bank vs. Planters Bank of Georgia, 9 Wheaton, 907; Trustees for Vincennes University vs. State of Indiana, 14 Howard, 277; Bouv. Law, Dic. Title, Municipal Corporations.)

VORIES, Judge, delivered the opinion of the court.

The plaintiff and the defendant were opposing candidates for the office of Justice of the County Court of St. Louis County, at an election holden on the first Tuesday after the first Monday of August, 1871. The certificate of election was given to the defendant, upon which he was commissioned and entered on the duties of the office.

The plaintiff filed his petition in the Circuit Court of St. Louis County, under the provisions of the statute, contesting the election of the plaintiff, and averring as a ground of his contest of said election, that the defendant at the time of the election held the office, and still held the office, of a director in the "Board of the President and Directors of the St. Louis Public Schools," and that defendant was in virtue thereof ineligible to the office of Justice of the County Court, because it is provided by law, that "no person shall be eligible to the office of Justice of the County Court, who at the time of his election shall hold any office under any Municipal or Railroad Corporation created by the laws of the State of Missouri," and that "the Board of President and Directors of the St. Louis Public Schools" was a municipal corporation created by the laws of the State of Missouri.

The defendant demurred to the petition on the ground, that it did not state any facts sufficient to entitle the plaintiff to contest the election, or to affect the defendant's right to the office. The St. Louis Circuit Court sustained the demurrer at Special Term, and rendered a final judgment against the plaintiff. The plaintiff appealed to the General Term of said Court, where said judgment was affirmed. The case has been brought to this Court by Writ of Error.

The only question presented to this Court by the plaintiff in error, is whether the defendant is disqualified or ineligible to hold the office of County Court Justice by virtue of his at the time of the election holding the office of School Director in "the Board of President and Directors of the St. Louis Public Schools." By an Act of the Legislature of the State of Missouri, entitled "an act concerning the County of St.

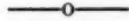
Louis" approved March 14th, 1859, and the acts amendatory thereof, it is provided, that no person shall be eligible to the office of Justice of the County Court, "who at the time of his election shall hold any office under any Municipal or Railroad Corporation created by the laws of the State of Missouri." (Laws of Missouri 1859, page 449, also Session Acts 1863, page 158; Acts 1871, page 109.) It is contended by the plaintiff, that "the Board of President and Directors of the St. Louis Public Schools" is a municipal corporation, and that defendant being a Director in said Board, is not eligible to the office of Justice of the County Court.

A municipal corporation is defined by Bouvier to be: "A public corporation created by Government for political purposes, and having subordinate and local powers of legislation. An incorporation of persons, inhabitants of a particular place or connected with a particular district, enabling them to conduct its local, civil government." (2nd Bouvier's Law Dic., 21; see also 2 Kent, 317, p. 275.) "The Board of President and Directors of the St. Louis Public Schools" is not a corporation created for *political* purposes, nor is it created for the purpose of enabling the people of the District named, to conduct its local, *civil* government, and the mere fact that its limits of jurisdiction are the same as that of the City of St. Louis, makes no difference in that particular; it is just the same as if it had constituted a township, or any other district described, as a School District. The corporation is created to take charge and control of the public schools and make rules for the management of the schools, to take possession and charge of all lands and lots which have been received for the inhabitants of St. Louis for school purposes, and to dispose of the same, and apply the proceeds to purposes of education under the provisions of the act. In fact, the Corporation is created by the State to assist in carrying out the general common School system of education adopted by the State, and although the particular district is separately organized and incorporated by the Legislature, it is no more a *municipal corporation*, than is the Board of Directors of any other School District in the State.

The general accepted definition of a municipal corporation would only include organized cities and towns, and other like organizations, with political and legislative powers for the local, civil government and police regulations of the inhabitants of the particular district included in the boundaries of the corporation. It was such corporations, that I think, were intended by the Legislature in disqualifying persons to hold the office of Justice of the County Court, who at the time should hold an office in any municipal corporation. Justice Dillon, in his work on "Municipal Corporations," uses this language in defining a municipal corporation: "Thus an incorporated School District or county, as well as a city, is a public corporation; but the School District or County, properly speaking, is not, while the City is a municipal corporation." Again in speaking of School Districts, Road Districts, Counties, Townships, &c. Judge Dillon says: "They are purely auxiliaries of the State, and to the General Statutes of the State they owe their creation, and the Statute confers all the powers they possess, prescribes all the duties they owe, and imposes all liabilities to which they are subject. Considered with reference to the limited number of their corporate powers, the bodies above named rank low down in the scale or corporate grade of corporate existence; and hence have been frequently termed *quasi* corporations. This designation distinguishes them, on the one hand from private corporations aggregate, and on the other from municipal corporations proper, such as cities or towns, acting under charters, &c." (Dillon on Municipal Corporations, pages 30 to 33.)

From the foregoing authorities as well as from the reason of the case, I am well satisfied that the term *municipal corporations* does not in its common acceptance or its legal sense include School Districts or corporations organized for the purposes of education only, either in connection with our Common School system or otherwise, and that the Legislature, in rendering officers of municipal corporations ineligible to the office of County Justice, never intended to include School Trustees.

The other Judges concurring, the judgment of the St. Louis Circuit Court is affirmed.



LOUISA BRUENSMANN, (LATE SCHAEFFER) *et al.*, Respondents, *vs.*
ANDREW CARROLL, Appellant.

1. *Conveyances—Interpretation—Intention—Verbal arrangement.*—When a grantor in a deed uses apt words showing what it was his intention to convey, that effect will be given to the deed, regardless of any verbal position or arrangement. [Rutherford v. Tracy, 48 Mo. 325, affirmed.]

Appeal from St. Louis Circuit Court.

Krum & Patrick, for Appellant.

The appellant stands by the doctrine of estoppel invoked, and by the total failure on the trial, to disprove his title and possession to lot 43, he being the owner and possessor of that lot.

Stewart & Ralston, for Appellant.

Where in a deed the general description is inconsistent with the particular description and also with the intention of the parties, as manifested by the deed itself, Courts will, in favor of the intention of the parties, reject the words of general description as a false demonstration. (2 Washb., on Real Prop., §§ 36, 37, 38.)

If the simple covenant of seizin be broken, the party is entitled to damages equal to the purchase money and interest. (Collier vs. Gamble, 10 Mo., 467; Rees v. Smith, 12 Mo., 347.)

WAGNER, Judge, delivered the opinion of the court.

By the record it appears that the parties were owners of adjoining lots, numbered 43 and 44, in Mills' addition to the city of St. Louis. The plaintiff owned and had a house situated on lot 44, and it was supposed by the parties that the house extended about nine inches on the side of lot 43, which was the property of defendant.

Whilst entertaining this belief, the plaintiff purchased of the defendant the strip of nine inches in length on the side of his lot supposed to be covered by her house, and paid him fifty dollars therefor.

The deed contained the statutory covenants of grant, bargain and sale, and the descriptive words after the granting clause, were as follows :

"A strip of nine inches more or less, off the east side of the east half of lot number forty-three, of block number two, in Mills' Addition to the city of St. Louis, or so much as is occupied of said lot by the house of the said party of the second part."

Then follows a more particular description by metes and bounds. It was subsequently ascertained, that the house was entirely on lot 44, and that no part of it was on the defendant's lot 43. Plaintiff then brought this action, for an alleged breach of seizin, to recover the purchase money. The trial was before the Court, without the intervention of a jury, and there was a judgment for the plaintiff. The declarations of law given and refused will show the theory upon which the case was tried.

For the plaintiff there was a declaration, that if the Court found from the evidence, that defendant, when he conveyed to plaintiff, had neither title to nor possession of the nine inches, more or less, which he purported to convey, then the plaintiff was entitled to recover her consideration money and interest from the date of the deed. For the defendant the Court declared, that if it was found from the evidence, that the house of plaintiff was wholly situate on lot 44, and it was further found from the evidence, that the description of the land in the deed, did not embrace or include any part of lot 44, then the plaintiff could not recover.

The Court refused two instructions asked for by the defendant. The first of the refused instructions was in the nature of a demurrer to the evidence, and was rightfully rejected, and the second was also essentially of the same character, and after reciting certain facts in evidence, declared as a conclusion of

law, that no recovery could be had. The declarations given for each the plaintiff and defendant, present the only question of any importance in the case, and that is, what land was conveyed or intended to be conveyed by the deed. If the parties intended there should be conveyed, and the deed actually did convey, a piece off of lot 43, then the case must be decided for the defendant, otherwise the judgment must stand for the plaintiff.

The conveyance is for nine inches, more or less, off the east side of lot 43, or so much as is occupied by the house of the plaintiff. This shows very clearly, that the minds of the parties were directed to the very land, on which the house stood and no other. The intention was to convey that, and that only. But if the defendant was not possessed of, and did not own that, then he conveyed nothing, and there was a total failure of consideration.

Greenleaf says, that the modern rule in construing deeds, is to ascertain the true intention of the parties, and to transpose the words, wherever it is necessary, in order to carry the general intention plainly manifested into effect. (2 Greenl. Cru. Tit. "Deed," Ch. 12, § 26.)

In the case of *Rutherford vs. Tracy*, (48 Mo. 325,) where many authorities are cited and examined, it was decided as the correct principle of law applicable to this question, that where the grantor uses apt or appropriate words, showing what it was his intention to convey, effect will be given to that intention, without regard to any mere verbal position or arrangement they may occupy in the deed.

The intention here seems to be very manifest. It was to convey the land on which the plaintiff's house was erected. That was the only thing had in view by the parties. The grantor undertook to do that, and nothing more. Every thing else may well be rejected as misdescription, so far as it is inconsistent with this essential and primary object. And as the grantor did not own or possess the land, he conveyed nothing.

I therefore think the judgment was right, and should be affirmed. The other judges concur.

Clarke v. Kitchen.

C. B. CLARKE, Respondent, *vs.* S. G. KITCHEN, Appellant.

1. *Practice, civil, trials—Instructions—Misleading.*—Instructions, which are likely to confuse and mislead the minds of the jury, should not be given.

Appeal from St. Louis Circuit Court.

Davis, Thoroughman & Jones, for Appellant.

The first instruction is true as a proposition of law, and should have been given.

Hendershott & Chandler, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

Action in the St. Louis Circuit Court by Clarke against Kitchen, to recover the value of services alleged to have been rendered by the former, as architect, to the latter.

The petition contained the items of the account sued on, and charged that the plans, specifications and drawings mentioned in the account were made at the request of the defendant for which he was to pay their reasonable worth, and averred, that the same were reasonably worth \$1106.18. The answer was a general denial. There was a jury trial, and the evidence was very conflicting. After the testimony was finished, the defendant asked the court to instruct the jury, that:

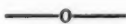
1st. "There must be a preponderance of evidence in favor of plaintiff; if there is not, the jury will find for the defendant."

2nd. "If the Jury believe from the evidence, that plaintiff agreed with defendant to furnish him a plan and specifications for an 11 or 12 room house, and that plaintiff was to superintend and have said house completed for *that* sum, and that plaintiff failed to furnish said plan and specifications, and failed to get a bid for the sized house agreed upon at the *price aforesaid*, plaintiff is not entitled to any commission, and the jury must find for the defendant."

These instructions the court refused to give; the defendant excepted; and the plaintiff had a verdict, and the cause after an unsuccessful motion for a new trial comes here by appeal from General Term, where the judgment of the Special Term was affirmed.

These instructions were both very properly refused. Indeed on argument here appellant's counsel rested his case solely upon the impropriety of the refusal of the first. That instruction might have cut off the plaintiff from the recovery of any amount whatever, although the testimony of the defendant himself tended to show, that plaintiff was entitled to recover something. Besides the instruction is such as to readily confuse and mislead the minds of the jury. The words "*preponderance of evidence*" are with the average jurors susceptible of, and very likely to receive, almost an infinity of construction.

I shall make no comment on the second instruction. There is no error in the record, and the judgment is, with the concurrence of the other judges affirmed.



DANIEL J. FOLEY, *et al.*, Appellants, *vs.* JOSIAH ALKIRE, *et al.*,
Respondents.

1. *Practice, civil—Trials—Verdict—Pleadings.*—A verdict against the admissions of the pleadings cannot be suffered to stand.
2. *Practice, civil—Pleadings—Verdict—Replication, nunc pro tunc.*—If where a replication was required, it was not filed, yet a court should not for that cause set aside a verdict, but should allow a replication of general denial to be filed *nunc pro tunc* to aid the verdict.

Appeal from St. Louis Circuit Court.

Alex. J. P. Garesche, for Appellants.

Samuel N. Holliday, for Respondents.

The counsel on both sides filed elaborate briefs, but as the court does not touch on the questions therein, they are necessarily omitted.

ADAMS, Judge, delivered the opinion of the court.

This was an action for \$4,263.55, the price and charges on thirty hogsheads of sugar alleged by the plaintiffs to have been sold and delivered by them to the defendants.

The answer of defendants charges, that the sugar was bought by sample through Leavitt and Winchester, brokers at St. Louis Mo., from the plaintiffs; that the sugar was, at the time of the contract of purchase, in Baltimore, Maryland, and by the terms of the contract, the thirty hogsheads were to correspond with the sample shown to defendants; that when the sugar arrived at St. Louis, the defendants caused the same to be inspected, and found that the sugar contained in the hogsheads did not correspond with and was not equal to the sample upon which the defendants made the agreement to purchase; that it was not the same kind of sugar agreed to be purchased, from the sample; that it did not suit the defendants, was inferior to the sample, and not worth as much; and the defendants refused to accept the same, and so notified the plaintiffs.

The plaintiffs in their reply denied that the sugar delivered did not correspond with the sample, or was not equal to the sample by which it had been sold, and denied that the sugar delivered was inferior to the sample; not worth as much, and that it was of a different grade and quality, and denied that the sugar delivered was not that agreed to be purchased by the defendants.

Under the instructions of the court the jury found a verdict for the plaintiffs for the amount claimed; a motion for a new trial was overruled, and judgment rendered for plaintiffs, and defendants appealed to General Term, where the judgment at Special Term was reversed, and the cause remanded. From this judgment of reversal the plaintiffs have appealed to this court.

From the bill of exceptions in this case, it seems that both parties were laboring under a mistake, as to the real issue presented by the pleadings. The question principally litigated on the trial, was whether the sale of the sugar was by sample or not.

The evidence introduced on both sides had reference mainly to this question, and the instruction which decided the case for the plaintiffs was predicated upon the ground that it was

Willi v. Dryden et al.

not a sale by sample; that the sale was consummated in Baltimore through brokers who acted for the defendants in the reception of the goods, and its completion did not depend upon the samples that had been sent to the defendants.

The answer and reply do not present any such issue as was tried. The reply admits in express terms, or by necessary implication that the sale of the sugar was by sample, as stated in the answer, and the only issue raised by the replication was a denial that the sugars delivered did not agree with the sample, or were inferior to the sample. If there had been no replication at all filed, and no steps taken to *non pros* the plaintiffs, the court would not for such omission set aside a verdict. A general denial ought to be filed *nunc pro tunc*, in aid of the verdict. But that is not this case. Here there was a reply filed by the plaintiffs, which admits that the sale of the sugar was by sample. A verdict against the admissions of the pleadings cannot be suffered to stand. Without passing upon the questions, whether there was any evidence tending to prove that the sale was by sample, and whether the instructions given for the plaintiff would have been right under a proper issue, I am clearly of the opinion, that in view of the admissions in the reply, this case was not properly presented to the jury.

The judgment of the General Term, reversing the judgment at Special Term, and remanding the cause, is affirmed. Judge Wagner absent. The other judges concur.

—o—

SAMUEL WILLI, Appellant, *vs.* THOMAS A. DRYDEN, *et al.*,
Respondents.

1. *Supreme Court—Testimony, weight of—Written instruments, legal effect of.*—This court in law cases will not judge of the weight of testimony, but where the evidence consists of written instruments it will look into them to see whether they were interpreted and construed according to their legal effect.
2. *Leases—Assignment—Rent.*—One, who receives an absolute assignment of a lease, is liable to the lessor for rent.

Willi v. Dryden et al.

*Appeal from St. Louis Circuit Court.**W. B. Thompson*, for Appellant.

The legal rule in the construction of written instruments, even where detached and separated, is to construe them as one writing. (15 Mo., 40; 7 Har. and John's 296; 18 Johns., 420.)

The assignment of a lease puts the assignee into the place the assignor with all the benefits and burthens attending the original lease, and the inherent covenants go with the land into whose hands soever the lands come. (*Waldo vs. Hall*, 14 Mass., 486.)

The same doctrine is the foundation of two decisions of Missouri which, so far as this doctrine applied, are decisive. (*Blair vs. Rankin*, 11 Mo., 441. *Smith vs. Brinker*, 17 Mo., 148.)

Dryden & Dryden, for Respondents.

The instrument offered and read by the appellant in support of the alleged *sealed* contract between him and respondents was not a deed. (3 Washb. R. R. 236-3 and notes; *Arthur vs. Weston*, 22 Mo., 378; *Webster vs. Ela*, 5 N. H. 540; *Chenoweth vs. Mayo*, 1 Breese, (Ils.) 155; *Smith vs. Bridge*, *Id.*, 2; *Brown vs. Gilman*, 13 Mass., 158.)

The only point is as to the finding of the court on the evidence.

This, this court will not review. (*Papin vs. Allen*, 33 Mo., 260.)

WAGNER, Judge, delivered the opinion of the court.

From the record it appears, that on the 23rd day of October, 1865, the plaintiff executed a lease of certain real estate in the City of St. Louis, to one Isaac H. Merritt.

The lease was for the term of eleven years, upon condition that the lessee should pay the lessor the annual sum of eight hundred and ten dollars in quarterly instalments, and in addition thereto should pay all taxes charged against the property. Merritt, the lessee, took possession of the premises, and

on the 19th day of July, 1866, assigned and transferred the lease to the Southwestern Freight and Cotton Press Company. The assignment by Merritt was conditioned that the company, should assume and perform all of the covenants and stipulations contained in the lease, and was in writing, and annexed to the same. Under this assignment the Cotton Press Company entered into possession of the premises, and paid the rents and taxes to the original lessor as long as it so remained in possession.

On the 24th day of March, 1869, the Cotton Press Company for a valuable consideration, made and delivered to defendants an assignment and transfer of the lease and the unexpired term thereof, which was also conditioned that the accruing rents, covenants, stipulations and conditions contained in the lease should be assumed and performed by the defendants.

This assignment was also in writing, and was annexed to the original lease.

Afterwards, on the 26th day of March, 1869, and before the acceptance of the assignment of the lease by the defendants, plaintiff, the lessor, by a writing attached to the lease agreed and assented to the transfer and assignment, provided the defendants would bind and obligate themselves to perform the covenants contained therein. Thereupon the defendants in writing on the 29th day of March, 1869, by an agreement under seal, promised as follows: "We hereby promise and agree to comply with all the covenants, stipulations and agreements contained in the annexed lease."

The defendants took possession of the leased property, and being in arrears for rent and taxes, this suit was brought by plaintiff to recover the same.

The principal defense made by defendants was that the agreement was not made with the plaintiff, and that they were only assignees of the unexpired term of the lease, and that there was no privity of contract existing between them and the lessor.

Willi v. Dryden et al.

The court rendered judgment for defendants and plaintiff appealed.

A preliminary question is raised here, that as no instructions were given there is no point of law saved for this court to pass upon.

The court will not judge of the weight of testimony, but where the evidence consists of written instruments we will look into them to see whether they were interpreted and construed according to their legal effect. (Waddell, *et al.*, vs. Williams, 50 Mo., 216.)

In the present case there is no contest about the evidence; there is nothing contradictory in it.

The lease and the assignments, together with the defendants' written obligations, constitute the whole of the testimony, and the only thing to be considered, is what effect do they have according to law? There is manifestly nothing in the point, that, because the lessor's name was not inserted in the written obligation executed by the defendants, the undertaking is void, because no promise is named in it. The papers must all be taken together. They form parts of one entire transaction. The lease contains the conditions, the assignment was subject to these conditions, the lessor assented to the assignment with the express understanding that the assignees should assume the burdens and comply with the stipulations contained in the lease. With all these facts before them, the assignees gave their obligation promising full performance.

This was as much an undertaking to observe the conditions and pay the rent and taxes to the lessor, as if the lessor's name had been directly inserted in the writing. Where the papers are all taken together this is its legal effect.

But aside from this, the settled principle of law is, that a person, who receives an absolute assignment of a lease, is liable to the lessors for the rent. This was expressly decided in *Smith vs. Brinker, et al.*, (17 Mo., 148,) and is conclusive in this case.

The judgment of the court below was clearly wrong, and must be reversed, and the cause remanded. The other judges concur.

Moore, et al. v. Lackman et al.

HENRY C. MOORE *et al.*, Appellants, *vs.* D. H. LACKMAN, *et al.*,
Respondents.

1. *Partnership—Notes—Dissolution—Power of one partner to bind the others.*—

One partner after dissolution of the firm, with notice thereof to the creditor, cannot bind the other partners by making a note in the name of the firm, even in renewal of a note of the firm.

Appeal from St. Louis Circuit Court.

Philip Donahue, for Appellants.

The individual note of a continuing partner, given for the debt of the firm, cannot be held to be a discharge of the partnership debt, even where there is an express agreement by the creditor to receive it as such. (2 Parsons Bills & Notes, 202; Waydell vs. Luer, 5 Hill, 448; Cole vs. Sacket, 1 Hill, 516; Brown vs. Stills, 49 Penn. S. R., 72.)

Krum & Patrick, for Respondents.

One partner after a dissolution of co-partnership has no authority to make a note in renewal of a note of the co-partnership.

SHERWOOD, Judge, delivered the opinion of the court.

Action in the St. Louis Circuit Court brought by the plaintiffs, under the name and style of Young, Moore & Co., against defendants, (who at one time were partners under the firm name of D. H. Lackman) for goods sold and delivered.

Lackman successfully plead his discharge as a bankrupt; Weber his co-defendant by his answer admitted the sale of the goods as charged in the petition, but stated that the partnership, which had existed between himself and Lackman, had been dissolved, and the latter continued business on his own account; that plaintiffs had due notice of such dissolution, and on the first day of September 1868, after such dissolution, upon a settlement made between plaintiffs and Lackman of the indebtedness for which suit was brought, and which indebtedness was then evidenced by open account and negotiable notes, Lackman executed and delivered to plaintiffs his separate individual notes, and plaintiffs accepted the same in satis-

faction of the demand sued on and without Weber's knowledge or consent extended the time of payment &c. A reply was filed to this answer, denying its allegations. There was a jury trial, some conflict of testimony on the issues raised by the pleadings, and a verdict for defendant.

The Court gave the following instructions for defendant :

"The Court instructs the Jury, that after dissolution of a partnership one partner cannot make a note in the name of the firm, even in renewal of a note of the firm, so as to bind the other partner. If therefore the Jury believe from the evidence, that the plaintiffs or any of them received the notes dated September 1, 1868, and that at that time the partnership between Lackman & Weber had been dissolved, and that at the time of the receipt of the notes dated Sept. 1, 1868, plaintiffs, or either of them had notice or knowledge of such dissolution of said partnership, then such notes can be treated and considered by the Jury only as the individual notes of the defendant Lackman, and not as notes of the firm."

"The Court instructs the Jury, that the payment by negotiable notes of prior indebtedness is binding on the parties when so intended by the parties, and in this case if the Jury find from the evidence, that Lackman after the dissolution of the firm gave his individual notes to the plaintiffs, and the plaintiffs knowing of the dissolution agreed to receive them in satisfaction of the preceding indebtedness, including the goods sued on, then the plaintiffs cannot recover against defendant Weber, and the Jury will find in favor of defendants."

"If the Jury find from the evidence, that, at the time the goods sued for were purchased, defendant executed three notes in payment thereof at four, five and six months, and that the defendants' partnership was afterwards dissolved, and that plaintiffs had knowledge and notice of such dissolution, and having such knowledge received the individual notes of Lackman in payment of the balance due on said former notes, and surrendered and canceled such former notes, to defendant Lackman; then the Jury will find for defendant John A. Weber, unless it appears that Weber had knowledge that such old notes were not in fact paid."

It is contended that these instructions were erroneous on the ground that the first instruction above referred to raises an issue not presented by the pleadings, and that there was no evidence on which to base the two other instructions complained of.

The first instruction was not at all irrelevant or improper, as it defined the inability of one partner, after dissolution and notice of such dissolution to those with whom the firm dealt, to bind his former co-partner, and the Jury were thus shown, that the act of renewing the notes by Lackman was a meaningless and nugatory one, unless done for the purpose claimed in defendant Weber's answer.

But even were this instruction the mere abstraction appellants claim it to be, this would not justify a reversal of the judgment, as other instructions were given which taken together with these here inserted presented the merits of the case very fairly before the Jury.

The evidence tending as it did very strongly to show the dissolution of the firm of D. H. Lackman in March 1867, the communication of such fact to plaintiffs; the subsequent renewal of the old notes of the firm by Lackman with these individual notes in "payment" of the old notes, the marking of the old notes "canceled by cash and notes Sept. 1, 1868, and the surrender on that date of those notes by plaintiffs to Lackman; the ineffectual endeavor of the latter, at the instance of the former, to procure Weber's indorsement and the futile and by no means praiseworthy attempt of the plaintiffs, after Lackman had filed his petition in bankruptcy, to regain possession from Lackman of the old notes was an amply sufficient basis for the other two instructions, whereof complaint is chiefly made. (See *Powell vs. Charless' Admrs.*, 34 Mo., 485.)

With the concurrence of the other Judges, the judgment will therefore be affirmed.

ROBERT KINSER, Appellant, vs. EDWARD W. SHANDS, et al., Respondent.

1. *Justices' Courts—Appeal bonds—Default—Motion to set aside.*—Bonds given for appeals before Justices of the Peace, where judgment was given by default but no motion was made to set aside the default, are *coram non judice* and void. [Garnett vs. Rogers, ante p. 145 affirmed.]

Appeal from St. Louis Circuit Court.

Hendershott & Chandler, for Appellant, cited : *Barns vs. Webster*, 16 Mo., 330 ; *Williams vs. Coleman*, 51 Mo., 21.

The defense is founded on the defendants' own omission, and is contrary to a fundamental principle, that no man shall take advantage of his own wrong. *Brooms Leg. Max.* 5th Am. Ed. side page 285.

Samuel N. Holliday, for Respondents.

The act of the justice, in granting an appeal was entirely without warrant of law, and void, and there is no consideration for the bond : in any such case, it is void.

A recognizance for an appeal from the judgment of a justice of the peace is void if not entered into in the time and manner prescribed by law (*Adams vs. Wilson*, 10 Mo., 341 ; *Garnett v. Rodgers*, March term, 1873, Sup. Ct. Mo. ; *Cockrill vs. Owen*, 10 Mo., 287 ; *Nichols vs. Circuit Court of St. Louis, Co.*, 1 Mo., 254 ; *Tilly v. Walls*, 4 Mo. 271.) *Garnett vs. Rodgers* establishes the position relied on by defendants.

ADAMS, Judge, delivered the opinion of the court.

This was an action on three appeal bonds, which had been given before a justice of the peace. Judgments by default had been rendered by the justice, and the appeals had been taken from these judgments without first filing motions to set aside the defaults, and these appeals were dismissed by the Circuit Court.

An appeal does not lie from a judgment by default rendered by a justice of the peace, until a motion has been made to set aside and overruled. The proceedings of the justice in taking these bonds, and granting the appeals, were *coram non judice*, and utterly void.

Gunn. et al. v. Sinclair.

The point was ruled by this court in the case of Garnett vs. Rogers, *et al.*, decided at this term.

Judgment affirmed. Judge Ewing not sitting. The other judges concur.

—o—

THOMAS GUNN, *et al.*, Respondents vs. WILLIAM SINCLAIR, Appellant.

1. *Landlord and tenant—Monthly tenancy—Notice of termination.*—In order to terminate a tenancy from month to month, the required notice must be given at or before the termination of the current month.
2. *Constable—Sales—Leaseholds having less than three years to run.*—A leasehold having less than three years to run, can be sold under an execution from a Justice of the Peace.
3. *Husband and Wife—Leasehold, ownership of—Sale in invitum.*—A leasehold, of which the wife is merely the legal owner, belongs by marital right to the husband, and can be sold *in invitum* proceedings against him.
4. *Landlord and tenant—Leasehold—Purchase by tenant.*—When a tenant purchases the leasehold of his landlord at an execution sale against his landlord, he thereby extinguishes the tenancy. [W. S., 880, § 15.]
5. *Forcible entry and detainer, statute of—Appeal bond—Judgment against sureties.*—The statute concerning forcible entry and detainer does not contemplate a judgment on the appeal bond against the principal and sureties, as in ordinary appeals from justices of the peace. If the bond be not complied with, it may be sued on, but a summary judgment in the same suit has not been provided for.

Appeal from St. Louis Circuit Court.

W. H. Horner and Daniel Dillon, for Appellant.

I. Defendant was entitled to one month's notice in writing of the intention of his landlord to terminate the tenancy. (2 W. S., 879, § 13.) The notice should have been given at least one month before the termination of some regular month of the tenancy. (1 Wash. R. P., (3rd Ed.) 525, § 18; Coote L. & T., 353, 354; 1 Furlong, L. & T., 587; Kemp vs. Denett, 3 Camp., 510; Baker vs. Adams, 5 Cush., 99; Prescott vs. Ellen, 7 Cush., 346; Sandford vs. Harvey, 11 Cush., 93; Anderson vs. Prindle, 23 Wend., 616; Wright vs. Masher, 16

Gunn, et al. v. Sinclair.

How. Pr., 54; People, *ex rel.*, Botsford vs. Darling, 47 N. Y., 666; Prickett vs. Ritter, 16 Ill., 96; Seems vs. McLees, 24 Ill., 192.)

II. The notice must indicate the time when the tenancy expires. (1 Wash. R. P. (3rd Ed.) 525, § 17; Currie vs. Barker, 2 Gray, 224; Willard vs. Barker, 2 Gray, 336; Hultain vs. Muengle, 6 Allen, 220; Wright vs. Masher, 6 How. Pr., 454; Huyser vs. Chase, 13 Mich., 98; Woodron vs. Michard, 13 Mich., 187.)

The tenancy would terminate on the tenth of the month, whereas the notice in this case stated that the tenancy expired on the 1st of November. This was clearly fatal. (Sandford vs. Harvey, 11 Cush., 93; Anderson vs. Prindle, 23 Wend., 616.)

III. Thomas Gunn alone, as between him and his wife, was entitled to the possession, and he alone could properly bring such an action. His wife was an improper party and her joinder was fatal. 1 Chitty's Pleadings, (14th, Am. Ed.,) 33.

IV. Judgment against the sureties on the recognizance for appeal from the justice, was improper.

There is nothing in the statute in reference to unlawful detainer, that authorizes such a judgment. (1 W. S., 653, § 33.)

This statute in reference to forcible entry and detainer and unlawful detainer is strictly a special one in derogation of the Common Law and penal in its nature, and must be construed strictly, and in the particulars in which the legislators intended that the statute in reference to ordinary civil actions before justices, should apply to cases under this statute, they expressly said so. (1 W. S., 653, § 34.)

V. The judgment being an entirety, if erroneous as to one is erroneous as to all. (Cov. Mut. L. Ins. Co. vs. Clover, *et al.*, 36 Mo., 392.)

James M. Loring, for Respondent.

I. The notice given of the termination of the lease was sufficient. (1 W. S., 879, § 13.)

The date of the service of the notice will be the day from which the month will begin to run, if no time is fixed in the notice itself. (1 Washburn on Real Property, 525-526, 3rd, Ed.; Burns vs. Bryant, 31 N. Y., 453.)

If the time is so indicated that the party notified will not be misled, the notice will be sufficient. (1 Washburn on Real Property, 526, § 20, 3rd Ed.; Smith, Landlord and Tenant, 237; Doe vs. Mophelt, 7 Q. B., 577; Sanford vs. Harvey, 11 Cush., 93; Doe vs. Kightley, 7 T. R., 59; Doe vs. Smith, 5th, A. & E., 350; Doe vs. Magher, 139; Granger vs. Brown, 11 Cush., 191.)

II. A provision authorizing the levy and sale of leaseholds of less than three years, *by constables*, cannot be found anywhere in the statutes, and the existence of a positive statutory provision cannot be inferred by implication.

It is not within the scope of the constable's authority to meddle with real estate of any description.

III. The judgment against the sureties on the recognizance for appeal from the justice, was correct. (W. S., 653, § 33; 851, § 23.)

ADAMS, Judge, delivered the opinion of the court.

This was an action of unlawful detainer for a house and lot in the City of St. Louis.

The plaintiffs were husband and wife. The wife held a leasehold of less than three years to run, on the property in dispute. It was not separate property secured to her use, but simply stood in her name as legal property.

The defendant on the 10th of February, 1870, entered into possession of the property, under a verbal subletting of the property from month to month. The rent was payable on the 10th of each month, and had been so paid up to the 10th of October, 1870. On the 12th of October, 1870, the plaintiffs served the defendant with notice to quit, and afterwards on the 25th of November, 1870, demanded the possession of the premises in writing, and commenced this suit before a Justice of the Peace on the 28th of November, 1870. On the first

day of October, 1870, the leasehold of plaintiff was sold at constable's sale under an execution against the plaintiff, Thomas Gunn, and the defendant bought it at such sale, and took a bill of sale from the constable.

The plaintiff recovered a judgment before the Justice, from which the defendant appealed to the Circuit Court, where the plaintiffs again had judgment against the defendant and his securities in the appeal bond.

This judgment is in the form prescribed by the statute for such judgments before Justices of the Peace. The defendant appealed to the General Term, and the judgment at Special Term was affirmed, and the defendant has appealed to this court.

1. The first question presented by the record is the sufficiency of the notice to quit.

This was a letting by the month, and from month to month, and no time was fixed for the determination of the lease. In such cases our statute, (2 W. S., 879, § 13,) requires a month's notice in writing to the person in possession to quit. This statute declares, that "All contracts or agreements for leasing, renting or occupation of stores, shops, houses, tenements or other buildings in cities, towns or villages, not made in writing, signed by the parties thereto or their agents, shall be held and taken to be tenancies from month to month, and all such tenancies may be terminated by either party thereto, or his agent, giving to the other party, or his agent, one month's notice in writing of his intention to terminate such lease."

It is plain from the language of this section, that such a lease can only be determined at the end of the month. Neither party can arbitrarily fix a time for the termination of the tenancy. If either party desires to terminate the tenancy, he must give a month's notice of his intention. If he suffers a new month to commence, he cannot terminate the tenancy till the end of the next month, and in order to do so, he must give the required notice at or before the end of the current month. This seems to be the settled law in regard to such tenancies. (See *Prickett vs. Ritter*, 16 Ill., 96; *Baker vs.*

Adams, 5 Cush. (Mass.) 99; Prescott vs. Elm, 7 Cush., 346; Sanford vs. Harvey, 11 Cush., 93; 1 Washburn's Real Prop., 525, § 18.)

Under this view, the notice given in this case being on the 12th of October, 1870, after the commencement of a new month, was not sufficient to terminate the tenancy in a month from that date, and if it could do so at all it could not have that effect before the 10th of December, 1870. And therefore when this suit was commenced, there was no unlawful detainer.

2. The next question presented is, whether the execution sale by the constable transferred the plaintiff's leasehold to the defendant.

An execution on a judgment rendered in a Justice's court, is required to be levied on the goods and chattels of the defendant. The word chattels at common law comprehended terms of years as well as movable goods. And if there was nothing in the statute to restrict this common law definition, an execution from a Justice of the Peace might be levied on terms of years of any duration. But our statute concerning executions, (1 W. S., 606, § 17,) provides, that "Every lease upon lands for an unexpired term of three years or more, shall be subject to execution and sale as real property, and shall not be subject to sale upon and by virtue of an execution issued by a Justice of the Peace."

By this restriction chattels consisting of leaseholds, can be sold at constable's sale, only where the leasehold is for less than an unexpired term of three years. The leasehold in this case had less than three years to run.

It belonged to the husband, by virtue of his marital rights, and was subject to his disposal at any time during coverture. If he could dispose of it himself for his own benefit, it was surely subject to the payment of his debts.

3. After the defendant had purchased this leasehold, in what attitude did he stand towards the plaintiffs? If a stranger had bought the leasehold at execution sale, could he not have attorned to such stranger? This in my judgment is the true in-

terpretation of the second clause of section fifteen of our Landlord and Tenant Act, (2 W. S., p. 880.) It contemplated a sale under execution or under a deed of trust, and not under a deed of trust only, as was intimated by Judge Holmes in *Pentz vs. Kuester*, 41 Mo., 447. The point was not before the learned judge in that case, and his intimation was a mere *obiter dictum*, which no doubt upon due consideration, he would have corrected. The language used in the statute referred to, plainly indicates a sale under execution as one of the modes of divesting the lessor's estate. If it had been confined to the execution of a trust deed, the preposition "in" instead of "under" would have been the only appropriate prefix. I do not see any good reason, why a sale "*in invitum*" should not be such a transfer, or assignment of the lessor's interest, as to warrant a suit by the assignee under the forcible entry and detainer law.

If a lessee can attorn to a stranger purchasing under execution, he thereby becomes his tenant, and cannot be subject to two separate landlords.

In the case under review, the purchaser himself was the tenant, and as he could not attorn to himself, his purchase must have the effect of extinguishing the tenancy.

4. This suit was commenced against husband and wife, but the judgment in the Circuit Court was against the husband alone. The wife was improperly joined, and her name ought to have been stricken out, but as there was no judgment against her, this error was immaterial.

5. The statute concerning forcible entry and detainer does not seem to contemplate a judgment on the appeal bond against the principal and sureties, as in ordinary appeals from Justices of the Peace. There is no provision in the statute authorizing such a judgment in the pending suit.

It is more in the nature of an appeal bond, where a case is taken to the Supreme Court; such bond may be sued on, if it be not complied with, but a summary judgment in the same suit has not been provided for. (See *Keary vs. Baker*, 33 Mo., 603.)

Judgment reversed and cause remanded. The other judges concur.

 Pier, et al. v. Heinrichoffen et al.

DELOS D. PIER, *et al.*, Appellants, *vs.* WILLIAM HEINRICHOFFEN,
et al., Respondents.

1. *Practice, civil—Pleading—Averments—Common law—Code—Notes—Demand and Protest.*—An averment of due demand and protest of a note was sustained at common law by proof of facts showing an excuse according to the law merchant, or dispensing with actual demand and showing due diligence, but it is not so by our Code. The facts proved must correspond with the averments.
2. *Practice, civil—Pleading—Code—Allegations—Facts constitutive.*—Every fact which the plaintiff must prove to maintain his suit, is *constitutive* in the sense of the Code and must be alleged.
3. *Practice, civil—Trials—Evidence—Testimony, anticipative—Offer to prove.*—When evidence is offered, which is inadmissible except by the proof of other facts, and there is no offer, or intimation given of an intention to prove such other facts, it is not error to reject the evidence.

Appeal from St. Louis Circuit Court.

Fisher & Rowell, for Appellants.

"An averment in the usual form, alleging due presentment, and notice, is sustained by proof of any *state of facts* showing an excuse according to the custom of merchants." (Greenl., Ev. Vol. 2, 197; Norton vs. Lewis, 2 Conn., 478; Hopkins vs. Liwell, 12 Mass. 52; Williams vs. Mathews, 3 Cowen, 252; Windham Bank vs. Norton, *et als.*, 22 Conn., 219.)

The rejection of any material testimony by the court, entitles the party to then take his non-suit, and this court will not refuse to set it aside because the record does not show, that plaintiff could make the other points in his case, or that he was prepared with proof on the other points. (Dowd vs. Winters 20 Mo. 361.)

Slayback & Haeussler, for Respondents.

EWING, Judge, delivered the opinion of the court.

This is an action on a promissory note by the plaintiffs as indorsees against defendants as indorsers, payable at the office of Williams, in St. Paul, Minnesota; the note bears date St. Louis, October 12, 1860, and is payable on the first day of July thereafter, (1861.) The petition contains the usual averments of presentment and demand of payment at the maturity of said

note, refusal to pay, protest of the same, and that defendants were duly notified thereof. The answer of defendants is a denial of the allegations of the petition. Plaintiffs made application for a continuance of the cause, on the ground of the absence of witnesses, who resided at St. Paul, by whom they expected to prove facts excusing the delay in making demand of payment, and in giving notice to the defendants. The motion for a continuance being overruled, and the cause being submitted to the court,—jury waived,—the plaintiffs read the note in evidence, and then offered to show by the certificates of protest of one Malmros, a notary public, and his deposition accompanying the same, that said note was presented for payment at the place where the same was made payable, that it was protested, and notice given the defendants on the 15th day of July, 1861. This evidence was excluded on the objection of defendants, whereupon plaintiffs took a non-suit, with leave, &c. The motion to set aside the non-suit being overruled, the cause is brought to this court by appeal.

The application for a continuance was obviously without merit. The suit was instituted in March, 1870. Immediately thereafter, as the affidavit states, steps were taken to procure the deposition of Terry, a witness residing at St. Paul, which failed, as is alleged, by reason of his temporary absence at Washington City. He remained absent however, until January, 1871, and it does not appear, that any further effort was made to take the deposition in the *interim*, a period of eight or nine months.

A second attempt was made it seems in 1871 (but at what time is not disclosed) with a like result. So that during a period of about nineteen months the failure to procure the testimony of a witness, whose residence was so well known, is utterly irreconcilable with that degree of diligence, that should be exacted of suitors under such circumstances.

The certificate of protest and the deposition of the notary were properly excluded. The note matured July, 1861. The evidence offered showed, that demand of payment was not made until July 15, some fifteen days after its maturity, and no reason or excuse was shown for this delay, nor was there an offer to make any such proof.

The order in which evidence may be introduced is a matter very much in the discretion of the court, and this discretion may be properly exercised by inverting the regular order, and admitting evidence that pre-supposes facts, which logically and naturally precede it, but when such evidence is offered abstractly without an offer to sustain it by proof of such antecedent or primary facts, and without which it would be wholly unavailing, and no intimation of such a purpose is given to the court, we cannot say the court erred in excluding it.

This evidence however was rightly excluded on more substantial grounds. The petition avers that demand of payment was made *at the maturity* of the note, and that defendant was duly notified thereof. This allegation was put in issue by the answer. Neither the evidence offered, nor that of the absent witness, as disclosed by the affidavit for a continuance, tended to prove this averment, but on the contrary to *disprove* it by showing an *excuse* for not making the demand at the time alleged in the petition.

It may be conceded, that at common law this petition would be sufficient; that the averment would be sustained by proof of any state of facts showing an excuse according to the custom of merchants, by proof of facts which dispense with actual demand and show due diligence, without stating them specifically in the pleading.

Is this good pleading however under our Code? For not only the forms of pleading, but the rules by which the sufficiency of pleadings, except where otherwise specially provided, are to be determined and prescribed by our Practice Act. (2 W. S., § 1, p. 1012.)

As the vice of the old system of pleadings was its prolixity, its general averments, and general issues, and the delay and expense inseparable from it, the new system (or the modifications of the old) which we have adopted has little claim to be considered a *reform*, unless it avoids such defects and furnishes rules, by which the great object of all pleadings is better attained, namely, to arrive at a material, certain and single issue. Hence, the great improvement of our Code consists in requir-

ing the pleadings to contain a plain and concise statement of the *facts, constituting* a cause of action, or matter of defense. (2 W. S., 1013, § 3; and 1015 § 3.) Facts, and not evidence, nor conclusions of law, must be distinctly stated. Every fact, which the plaintiff must prove to maintain his suit, is *constitutive* in the sense of the Code, and must be alleged. Facts, which dispense with the necessity of making demand of payment and giving notice to the indorser, are as essential to the plaintiffs' right of recovery, as the fact that the defendant indorsed the note, or that it was executed and delivered by the maker, or that plaintiff is the holder. And the defendant has the right to controvert the one or the other in his answer. He should therefore be informed by proper averments in the petition, what facts are relied on to charge him, so that he may have an opportunity to controvert them. Such an allegation of demand of payment at *maturity*, and due *notice* thereof to the indorser, could give no intimation to the defendant of the nature of the evidence, by which the plaintiff proposed to sustain it. He could only know, that he received no notice; but of what steps if any were taken to give it, or of the causes of the failure to give it, or of the facts relied on to excuse the want of it he of course is presumed to have no knowledge. These are matters within the knowledge peculiarly of the plaintiff, which he should allege in his pleading, and prove. He alleges facts, the legal *effect* of which if true could charge the defendant; but he claims, that he should be allowed to sustain this allegation by facts of a totally different character, not alleged in his petition, because the same legal consequences would follow.

In *Garvey vs. Fowler*, 4 Sand., 665, it was held, that where in an action on a check, facts are relied on which excuse notice of presentment and non-payment, as that the drawer had no funds in the bank the day the check was presented, they must be stated in the complaint. And that an averment of due notice will not be sustained by evidence of facts excusing notice.

To the same effect is *Shultz vs. Dupuy*, 3 Abb. Pr., 252.

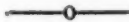
The question has been decided the same way in Iowa, *Lambert & Co. vs. Palmer, et al.*, 29 Iowa, 104, the court holding

Scharringhausen, Admr. v. Luebsen.

that under an averment like that in the case at bar, there could be no recovery upon proof of facts amounting to a waiver of demand and notice, as a subsequent promise to pay by the drawer or indorser after full knowledge of the facts. See, also, *Cole vs. Wintercost*, 12 Texas, 118.

It is scarcely necessary to add, that the codes of New York, Iowa and Texas, in respect to the rules of pleading, are substantially the same as our own.

Judgment affirmed. The other judges concur.



WILLIAM SCHARRINGHAUSEN, Administrator of JOHN SCHLESACK
Appellant, vs. JOHANN HEINRICH LUEBSEN, Respondent.

1. *Partners—Articles of Agreement—Interpretation of.*—In the articles of co-partnership it was agreed, that in the case of the death of one partner, the other should have the right to recover the fourth part of a certain chattel and against that he shall pay to the deceased the sum of one thousand dollars, after the deceased shall have paid all his debts which he owes to the partnership up to the date. *Held*, that this clause gave the surviving partner an option of purchase, and did not import an absolute covenant or engagement.

Appeal from St. Louis Circuit Court

F. & L. Gottschalk, for Appellant.

By taking the whole contract together it will be seen that the parties were tenants in common in a certain chattel; that upon the death of one of the tenants in common, his interest was to revert in his co-tenant and as the assessed value of such interest, his representatives were to receive \$1,000 which said co-tenant obligates himself by said contract to pay.

Rudolph Schulenburg, for Respondent.

By the terms of the agreement it was at the election of the defendant, whether he would recover the interest of the deceased.

EWING, Judge, delivered the opinion of the court.

This is an action to recover a sum of money, which is claimed to be due under a stipulation contained in articles of co-partnership, to which Schlesack plaintiff's intestate, and the defendant were parties. The cause was submitted to the Court a jury being waived, upon an agreed statement of facts, and there was a judgment for the defendant, which on appeal to the General Term was affirmed, and from which the cause is brought here by appeal. The allegations of the petition are substantially, that Schlesack formed a co-partnership with the defendant for carrying on the "flying horse business" in St. Louis; that Schlesack put into the concern \$1,000 in money and his labor and attention in running the same; that by the articles of agreement entered into between them, it was provided, among other things, that in case Schlesack should die, then his interest, to-wit: the fourth part in said concern, should revert to the defendant; and he should pay therefor "to the deceased" the sum of \$1,000, subject to any deduction on account of indebtedness, if any, on the part of the deceased to the concern. It was also provided, that Schlesack should have no right to sell his interest in said concern to any other person than defendant or his heirs; that Schlesack departed this life in 1870, being in no way indebted to the defendant or the concern; that plaintiff since Schlesack's death has demanded payment of said sum, and has tendered to defendant a bill of sale of the interest of the deceased in said concern, &c.

The answer denies all the material allegations of the petition, except the execution of the agreement therein referred to.

Defendant on the trial of the cause admitted the execution of the agreement referred to in the petition, that Schlesack put \$1,000 in money and his labor and attention into the concern; that at the time of his death he was not indebted to the firm, and that demand of the money and tender of a bill of sale had been made by plaintiff, as he alleged in his petition. Plaintiff read in evidence the agreement or articles of co-partnership, upon which the suit is founded, from which it appeared in addition to what has been already stated as ad-

Scharringhausen, Admr. v. Luebsen.

mitted,—that Schlesack put into the concern \$1,000 as capital stock, for which he was to have an interest of one-fourth part therein ; was to be liable to the same extent for all expense of the business, such as repairs, lease, insurance, and losses, and to share in the same proportion in the profits, that in the event of his death his wife and children were to have “the same right ;” that he should have no right to sell his interest in the partnership to any one except the defendant ; that in case of his death, “defendant, should have the right to recover the said fourth part of the said “*canonsell*” (flying horse,) and against that he shall pay to the said John Schlesack the sum of one thousand dollars, after the said John Schlesack has paid all his debts which he owes to the said *canonsell* up to the date.”

The only question in this case is, as to the proper construction of the partnership agreement read in evidence ; whether it contains any covenant or agreement, which could be the foundation of an action at law ; or which is so distinct from and independent of the partnership, as to involve no accounting between the partners, and no investigation of profits and losses of the concern.

The theory of the petition is, that it was absolutely obligatory upon the defendant on the death of his co-partner Schlesack to pay his representatives \$1,000 less the debts due from Schlesack to the firm, in consideration of his interest in the partnership. This is a misconception of the nature and legal effect of the instrument. So far from imposing an obligation of this character upon the defendant, it leaves it entirely optional with him, whether he would take the interest of his co-partner on these terms, or not. This is the only reasonable interpretation that can be given to the clause, which says the defendant shall have the right to recover the said fourth part, &c. It is only by a perversion of the language employed, that a different conclusion can be reached, interpreting words which give a mere option or confer a privilege, so as to import an absolute covenant or engagement. Language should be very explicit and unequivocal to warrant the inference

Einstein v. Holt.

of an intention to enter into a stipulation so extraordinary as that which it is claimed is created by this clause of the instrument in question.

Judgment affirmed. The other Judges concur.

—o—

WILLIAM EINSTEIN, Appellant, *vs.* WILLIAM T. HOLT, Respondent.

1. *Contracts—Interpretation of—Agents.*—A. professing to act for himself and for B. and C., makes a contract under seal with D. agreeing, that he will do certain work for D., for which D. agrees to pay him, and the contract concludes, that the undersigned bind themselves in the penal sum of one thousand dollars for its fulfillment. A. and D. alone sign the contract. Upon a suit for not doing the work; *held*, that A. alone was liable.

Appeal from St. Louis Circuit Court

D. T. Jewett, for Appellant.

Lackland, Martin & Lackland, for Respondent.

These obligations and covenants are all personal covenants assumed by Sheppard alone. If a person covenants in his own name, it is his covenant, not the covenant of his principal. (*Appleton vs. Binks*, 5 East, 148; *Townsend vs. Hubbard*, 4 Hill, 351; *Skinner vs. Gunns*, 9 Porter, 305-7; *Stringfellow vs. Mariott*, 1 Ala., 573-576; *Deming vs. Bullitt*, 1 Blackf., 241, 242; *Hale vs. Woods*, 10 N. H., 470; See cases collected 1 Am. Ld. Cas. 585.)

WAGNER, Judge, delivered the opinion of the court.

This was an action brought against the defendant for breach of contract, for failing to drill or bore certain tracts of mineral lands belonging to the plaintiff.

The contract set out in the petition, is alleged to have been made between the plaintiff Einstein, and a firm under the name and style of Holt & Severance, of which defendant was a member.

It is stated, that said contract was made in writing in the name and for said Severance & Holt, whereby they agreed, that Sheppard as their agent should do certain work, and it is further averred, that the parties, plaintiff and defendants bound themselves in the penal sum of one thousand dollars for the performance of the agreement.

The answer denied the existence of any such contract.

To sustain the allegations of the petition a written contract was produced, signed by Sheppard and the plaintiff, and the only question in the case is, whether this was the individual contract of Sheppard, or whether it bound the defendants.

The agreement recites that it is made and entered into between Albert Sheppard for himself, and as authorized agent for Severance & Holt, owners of a patent Diamond Drill, and William Einstein. It then continues "Said Albert Sheppard hereby agrees to bore and drill," &c., and then describes the work to be done, and says, "All of said work to be done by said Albert Sheppard free of any charge or cost to said William Einstein of any kind." * * * "In consideration of the foregoing described work so performed, said William Einstein hereby agrees to give and convey by deed free of incumbrances to Albert Sheppard at the completion of said work" certain lands, &c., &c.

There is then a proviso, that Einstein shall have the option to pay "said Albert Sheppard" money in lieu of the lands, and thereby relieving the lands from all claims by said Albert Sheppard and his associates. The conclusion of the instrument is as follows: "For the true fulfillment of the foregoing condition, the undersigned bind themselves unto each other in the penal sum of one thousand dollars, for the payment of which we bind ourselves, our heirs and assigns, executors and administrators." * * * "In witness whereof we have hereto set our hands and seals the day and year first above written, and have executed this instrument in duplicate, and one handed to each party."

(Signed)

A. SHEPPARD, [SEAL.]

WM. EINSTEIN, [SEAL.]

Stout v. St. Louis Tribune Co.,

The determination of the case depends upon the construction that is to be given to the written contract, or to the right of the plaintiff to sue upon it against the defendant. The authority to Sheppard did not authorize him to bind the defendant, by a sealed instrument, but the seal in the present contract was unnecessary, and therefore may be disregarded.

But by any reasonable interpretation can it be shown, that it was the intention to bind the defendant? The agreement is unambiguous and explains itself. Sheppard starts out in the first place by declaring, that he enters into the agreement for himself, and as authorized agent for defendant. He thus states, that he is one of the contracting parties, not simply as agent, but for himself. In the subsequent stipulations and covenants the defendant is noticed only once, and then incidentally. Sheppard agrees personally and individually to do the work, and Einstein promises to pay him. No other party is spoken of, nor can it be legitimately inferred, that there was any one else in view. Then when the agreement is concluded, each binds himself reciprocally to the other in a penal sum for the fulfillment of the conditions.

Sheppard sets his hand and seal to the contract not as agent, acting for and on behalf of another, but for himself. There is absolutely nothing to bind any one but the parties who sign the agreement.

I have been unable to find any case going to the extent of holding that any one but the party signing the agreement was bound under the circumstances here shown.

The judgment in the court below was for the defendant, and should be affirmed. The other Judges concur.

—o—

IRA H. STOUT, Respondent, *vs.* ST. LOUIS TRIBUNE CO., Appellant.

1. *Practice, civil—Pleadings—Contracts—Common counts.*—Where work is done or services rendered under a special contract, and nothing remains to be done, except for the defendant to pay the money agreed on, the plaintiff can sue on the common counts in assumpsit.

Stout v. St. Louis Tribune Co.

2. *Practice, civil—Trials—Evidence—Quantum meruit—Contract produced—Liability of defendant.*—If a plaintiff sues on a *quantum meruit*, and yet the contract is produced on the trial, if any fact necessary to establish defendant's liability under the contract is not proved, the plaintiff cannot recover.
3. *Practice, civil—Trials—Evidence—Contracts—Justices' Courts—Circuit Court—Allegata—Probata.*—In trials in the Circuit Court on appeals from Justices Courts in actions of assumpsit, the evidence must prove the allegations necessarily made if the action had been first brought in the Circuit Court where pleadings are required.

Appeal from St. Louis Circuit Court.

C. M. Whitney, for Appellant.

I. There being no evidence to support the judgment, it cannot stand even though no point had been raised by instructions. (Hunt vs. Leavenworth, 11 Mo., 629.)

II. The plaintiff could only recover for commissions (under his agreement with defendant,) on advertising bills collected before the institution of this suit, unless he affirmatively proved negligence on the part of the defendant in making such collections. (Hunt vs. City of Utica, 18 N. Y., 442; Baker vs. City of Utica, 19 N. Y., 326.)

S. S. Merrill, for Respondent.

I. We are not bound by the contract, because the defendant had violated it, and we sue on a *quantum meruit*.

II. If we are bound by the contract, having performed all of our part of the contract, and proved non-payment by defendant, we are entitled to recover, unless defendant proves performance on his part, or excuse for non-performance. Under the contract, and his custom at the time of making the contract, shown in evidence, which thereby became a part of the contract, (1 Greenleaf's Evidence, § 294,) it was his duty to collect the money; and he fails to show any attempt to do so, or excuse for not doing so.

VORIES, Judge, delivered the opinion of the court.

This action was brought before a Justice of the Peace, was brought to recover the amount of an account filed with the Justice for commissions charged to be due upon the amount

of certain, advertisements procured by the plaintiff for defendant, and to be published in its paper.

The different items of an account for commissions, together with the advertisements on which it was charged, were set out in two bills of particulars, in one of which the commission charged was fifteen per cent., and in the other twenty-five per cent.

The first bill of particulars showed advertisements in the aggregate to the amount of \$958.77, upon which the commission was \$143.82, which was credited with an amount paid of \$66.85, balance claimed, \$76.77.

The second bill of items bore date, 22nd day of January, 1870, and the items continued to March 10th, 1870. The aggregate of the advertisements charged for in that account, was \$408; commission at twenty-five per cent. claimed, was \$102; this was also credited with the sum of \$68.75. Balance claimed was \$35.25, making the whole amount claimed to be due \$110.22.

A trial was had before the Justice, where the plaintiff recovered judgment for the full amount of the account. An appeal was taken from this judgment to the St. Louis Circuit Court, where judgment was again rendered for the plaintiff for the account, which judgment was affirmed in the court at General Term. Motions were made for a new trial in Special Term, and for a re-hearing in the court at General Term, each of which being overruled, defendant excepted.

The advertisements, for which commission is charged, up to the 22nd day of January, 1870, as charged in the first bill of particulars, were obtained under a verbal contract, by which the commission to be charged, was fifteen per cent. Those charged for after the 22nd day of January, 1870, were obtained under a written contract, and for which the price agreed to be paid was twenty-five per cent.

The plaintiff on the trial had in the Special Term of the St. Louis Circuit Court, offered and read in evidence a written agreement between plaintiff and defendant, dated 22nd day of January 1870, by which the defendant authorized the

plaintiff to solicit advertisements for defendant's newspaper, plaintiff taking such rates as defendant might direct. The "defendant to pay plaintiff twenty-five per cent as a compensation for procuring the same, on all advertising that the said Tribune Company or its representatives may accept on this contract." It was further agreed by said contract, that defendant would allow plaintiff to draw ten dollars each week, the amount so drawn to be accounted for as a credit on account of commission for the month the sum was drawn in, provided the commissions of the week amounted to such a sum; "all commissions to be paid to said Stout as the advertising accounts are paid into the office of said Tribune Co., or to its agent, and that a settlement of commissions due said Stout shall be made on the first of each month of all business of the previous month." It was further provided by said contract as follows:

"5th. That the said Tribune Co., through its book-keeper or cashier, shall put down in the account books (to which this contract is annexed and made part of same,) in his own handwriting, on the day that they may be procured under this contract, all advertisements procured by said Stout, in which the amounts for advertisements are to be specified, and the amount also of the commission that there would be due thereon, and on the day they are paid, to specify the amounts opposite received therefrom, and specify the commission paid, when same is paid over to said Stout. 6th. This contract to take effect January 24th, 1870, and remain in force as long as may be mutually agreed upon. The old account under fifteen per cent. commission, to be settled as soon as the moneys therefor are collected."

The plaintiff also proved by his own evidence, that he had procured the advertisements named in his several bills of particulars, and that they amounted to the sums therein named, and that they were entitled to the credits therein named, and that the commission on the one bill was twenty-five per cent., and the other fifteen per cent. as therein named, and that the bill on which he charged twenty-five per cent., was made be-

tween January 24th and March 10th, 1870, that he had never waived commission in any case, had great difficulty in collecting his pay, went time and again and could not get it. This was all of the evidence given or offered on the part of the plaintiff.

The book-keeper of the defendant was examined on the part of the defendant, whose evidence tended to prove, that it was always understood by plaintiff, that his commission was not due until the pay for the advertisement was collected, that when plaintiff applied for money, his habit was to look at the books, and see what had been collected, and if no advertisement had been collected that no payment was made, that plaintiff never objected to this course; that this was the general rule, but that he sometimes paid plaintiff some in advance of the collections; that there was nothing due plaintiff for commission, when the written contract was made in January 1870; there was nothing due plaintiff for commission as none had been collected that was not paid for; that it was their custom on the first of each month to send out their accounts and try to collect. The witness testified that some of the amounts due for advertising which had been procured by plaintiff, had been collected since the commencement of this suit.

At the close of the evidence, the defendant asked the court to give the following instruction or declaration of law.

"The plaintiff is not entitled to a judgment for any collections made since the institution of this suit before the Justice, and is not entitled to judgment for commissions upon any advertisements not collected."

This instruction was refused by the court, and the defendant excepted.

The principal question for consideration in this court is, as to whether under the evidence in this case, this instruction was properly refused by the court. It is insisted by the plaintiff in this case, that his suit was not brought on the contract read in evidence, but was simply an action on an account to recover for the value of the services rendered, and that therefore

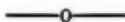
he was not bound to show that the defendants were liable to pay under the provisions of the contract. It is very true, that where work is done or services performed under a special contract, and the plaintiff has fully performed the contract on his part and nothing remains but a duty on the part of the defendant to pay the price agreed on, the plaintiff is not in such case bound to sue on the written contract, but may use the common counts in assumpsit, but still when the contract is produced on the trial, the plaintiff will be required to prove that he has performed the contract on his part, and that by virtue of the provisions of the contract, the defendant is required to pay the price agreed on; if any fact, necessary to create a liability on the part of defendant to pay, is wanting, the plaintiff cannot recover.

By the contract read in evidence in this case, the defendant agreed to pay plaintiff for soliciting advertisements, twenty-five per cent. of the price of the advertisements secured. The plaintiff was to be paid ten dollars per week, provided the advertisements amounted to that sum in the week. The balance of the commission was to be paid to plaintiff, as the accounts for advertising were paid into the office of defendant, or to its agents, and that a settlement should be made of the accounts on the first of each month. It is further provided by the contract, that it shall take effect on the 24th day of January, 1870, and that the old accounts under the fifteen per cent. commission, were to be *settled as soon as the moneys therefor are collected*. If a lawyer should bring a suit on this contract in a court of record where formal pleadings are required, he would not expect to recover beyond ten dollars per week, unless he alleged in his petition either that defendants had collected money for the advertisements and refused to pay the plaintiff his commission thereon, or that it wrongfully failed or refused to collect accounts, which were on solvent persons, and could and would have been collected, but for the wrongful negligence of the defendant to do so, and even to collect the ten dollars per week it would have to be shown, that advertisements to that amount had been obtained during the week.

City to use etc., v. Schoenemann.

This suit having been brought before a Justice of the Peace where no formal pleadings are required, those facts must appear from the evidence or he cannot recover, and this whether the action is founded on the contract in terms, or on an account for the work performed under the contract. The plaintiff assumes that the defendant has violated the contract, and therefore he was no longer bound by its provisions. This is assuming a fact which ought to have been tried in this case; whether the defendant had violated the contract or not, was the pertinent question in issue upon the trial. It is not necessary to say that no recovery could be had in this suit for amounts becoming due after the commencement of the suit. There being no evidence in the case to show that accounts were due from solvent persons, and that defendant had wrongfully failed to collect the same, or that accounts had been paid not settled for, it follows that the instruction asked by the defendant ought to have been given by the Circuit Court. For the refusal of the court to give said instruction, and because the court rendered judgment for the plaintiff, the judgment ought to be reversed.

The other Judges concurring, the judgment of the Circuit Court is reversed, and the cause remanded.



CITY to use of EDWARD FOX, Respondent, *vs.* EMILE L. SCHOE-
NEMANN, Appellant.

1. *St. Louis, City of—Charter—Ordinances—Sewers—Special taxes.*—A special tax-bill was issued for the construction of a sewer in the City of St. Louis. The City charter then in force provided, that sewers should be of such dimensions as might be prescribed by ordinance, and might be changed, enlarged or extended. The work was begun under a defective ordinance, but during its progress another ordinance was passed curing the defect, and all the work was in conformity with the latter ordinance; *held*, that the tax-bill was valid.

Appeal from St. Louis Circuit Court.

Krum & Patrick, for Appellant.

City to use etc., v. Schoenemann.

By section 2 of ordinance (No. 6626,) the City Engineer was empowered to construct said sewer with such materials and of such dimensions as he might deem requisite. By subsequent ordinance (No. 6854,) the materials and dimensions of said certain sewer were specified by the City Council. Before the passage of the latter Ordinance said sewer was nearly completed, and was entirely completed in front of appellant's property. Section 16 of Revised Charter of St. Louis, approved March 13, 1867, (Session Acts 1867, p. 75,) under which these ordinances were passed, provides that "such district sewer shall be of such dimensions as may be prescribed by ordinance." The power of the City Council to prescribe dimensions and materials cannot be delegated to the City Engineer. (*Ruggles vs. Collier*, 43 Mo., 353; *City of St. Louis vs. Clemens*, 43 Mo., 395; *Sheehan vs. Gleeson*, 46 Mo., 100.)

The Council has no power to ratify an invalid City Ordinance by a subsequent Ordinance in a case like this. (*Mayor etc. vs. Porter*, 18 Md. 284; *Matter of Buhler*, 32 Barb 79; *Ruggles vs. Collier*, 43 Mo. 367; *Brady vs. The Mayor N. Y.*, 20 N. Y. 312; *Reilly vs. Phila.*, 60 Penn. St., 467; *Grogan vs. City of San Francisco*, 18 Cal., 590.)

There is nothing retrospective in the language of the latter Ordinance, and it is not supplementary or additional to the first.

F. & L. Gottschalk, for Respondent.

The charter of 1867, (Sess. Acts 1867, p. 75, § 16), provides, that the sewers shall be constructed of such dimensions as may be prescribed by ordinance, and may be changed, enlarged or extended. Any defect in Ordinance 6626 is cured by the contract, which contains a full specification, and by Ord. 6854, which the council passed before the assessment and before the sewer was completed. Nor was said Ordinance, 6626 void. It was good so far as it went. (*Sheehan vs. Gleeson*, 46 Mo., 100.)

There is no time prescribed when the council shall pre-

scribe the dimensions. They may do it during the progress of the work.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff obtained judgment in the Court below on a special tax bill for the construction of a sewer, and the defense was that the work was done without authority. It seems that the work was commenced under and by virtue of an Ordinance that was palpably defective, but during its progress and before its completion a new Ordinance was passed, which was authorized by the Charter, and which cured the defect.

It is now argued, that as at the commencement of the work there was no legal ordinance, it was impossible to impart vitality to the contract or undertaking by any subsequent enactment. But in reference to the facts of this case we do not think that the position is tenable. The Charter under which the proceeding was had, declared that sewers should be of such dimensions as might be prescribed by Ordinance, and might be changed, enlarged or extended. Hence it was competent at any time to change the original Ordinance, and prescribe the dimensions of the sewer. It is of no particular importance, that some of the work was done under the first Ordinance, as the whole contract was not completed and finished till after the adoption of the second Ordinance. It appears that the entire construction was in conformity with the terms of the latter. The law did not take effect as to part but extended to the entirety. This is not like the case of *Ruggles vs. Collier*, (43 Mo., 353,) where the contract was made and the work executed throughout under a single ordinance that was wholly void. Nor is it analogous to *The Mayor of Baltimore et al. vs. Porter*, (18 Md., 284,) the strongest case cited by the appellant, where the City proceeded without any authority, and after all the rights of the parties were determined, and after suit brought, the City undertook by a subsequent Ordinance to confirm the void act. Here, although the authority was originally defective, a law curing the defect was passed in time, and the work then progressed

and was completed under the valid act. Under the provisions of the Charter, the City exercised a power directly granted to it, and I can perceive in this record no sufficient cause to justify a reversal.

Let the Judgment be affirmed. The other Judges concur.

—o—

CITY of ST. LOUIS, Respondent, *vs.* THOMAS W. SHEILDS, Appellant.

1. *Laws—Legislature—Power to alter or repeal—Municipal Corporations.*—Legislatures can alter or repeal at will all acts affecting or giving power to municipal corporations, unless the language of the act is too clear to admit of a doubt that they parted with that power.
2. *Laws—Contracts, obligations of—Parties in interest—Third parties.*—If a law impairs the obligations of contracts, the persons injuriously affected thereby are the proper parties to apply to set it aside; third parties have no standing in court for such purposes.

Appeal from St. Louis Circuit Court.

Spencer & Hatch, for Appellant.

I. It does not belong to the complainant vicariously to enforce the contract of other persons or protect their rights. (*Gilman vs. City of Sheboygan*, 2 Black, 513.)

II. The burden of proof that the act in question is unconstitutional rests upon the complainant, and that proof must be so clear and convincing that not a doubt remains. (*Fletcher vs. Peck*, 6 Cranch., 87; 48 Mo. pp. 470 and 471.)

III. All Legislative enactments containing a delegation of power to municipal corporations exist here "*bene placitum*," and are revocable at pleasure. (*Debolt vs. Ohio Life Ins. & Trust Co.*, 1 Ohio State 568; *East Hartford vs. Hartford Bridge Co.*, 10 How, 535.)

IV. "The imposition, modification and removal of taxes, and exemption of property from such burdens, is an ordinary exercise of the power of State sovereignty. There is no pledge expressed or implied that this power should not thereafter be

exercised." (Gilman vs. City of Sheboygan, 2 Black, 513.) The unlimited power of the State over municipal corporations is also fully considered in Kent's 2 Com., pp., 305 and 306; Mechanics and Traders, Bank vs. Debolt, 1 Ohio State R., 591; 2 Parson, Cont. p., 681. Dartmouth College vs. Woodward, 4 Wheaton, 697; 13 Mo., 400; 34 Mo., 546; Knoup vs. The Piqua Bank, 1 Ohio State R., 603.)

N. A. Mortell, for Respondent.

I. If the contract between the City and the purchasers of its harbor bonds when made, was valid by the laws of the State, its validity and obligations cannot be impaired by any subsequent legislative action or decision of its courts altering the construction of the law. (4 Wallace, 206; 16 Howard, 432; 1 Dillon Cir. Ct. R., 528.)

II. Where a State has authorized a municipal corporation to contract and exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The State and corporations in such cases are equally bound. The power given becomes a trust which the State cannot annul and the corporation must execute. (Von Hoffman vs. City of Quincy' 4 Wallace, 535; 1 Dillon Cir. Ct. Report, 526; 2 Am. Law Register; 4 Wright, Pa., 348; 4 Peters, 514; 3 Howard, 133.)

III. This act of 1872 repealing the wharfage tax, is an exercise of judicial power by the Legislature which the United States Constitution has expressly forbidden. (Cooley Constitutional Limitation, 87, 114, 392.)

McCarty, for Respondent.

I There was an express agreement that this power of taxation should not be withdrawn. The revenues of the wharf were pledged as security, and a security cannot at the same time be pledged and withdrawn.

II. The City of St. Louis appears as a party to the contract that is impaired; it is in the enforcement of that contract that this question arises.

III. Where a State has authorized a municipal corporation

to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. (4 Wallace, 534-5.)

WAGNER, Judge, delivered the opinion of the court.

The question presented for determination is the constitutionality of the act, approved March 28, 1872, prohibiting the collection of wharfage from steamboats, so far as the same applies to the city of St. Louis.

It seems that in 1865 (Sess. Acts 1865, p. 440,) the Legislature passed an act for the improvement of the harbor of the city. By the provisions of that act, the city was authorized, for maintaining and improving the wharf, to apply all the net receipts from wharfage, and all the money at that time in the Treasury to the credit of the wharf funds; also, for the same purpose to borrow \$500,000 by an issue of bonds, running for the term of twenty years, for the payment of the principal and interest of which the revenues of the wharf were to be pledged; and the City Council was further authorized, in its discretion, to levy a harbor tax of not exceeding one-tenth of one per cent. upon all property made taxable by law for State purposes within the limits of the city, the proceeds of which tax was to be held sacred for the purpose of paying the principal and interest of the wharf and harbor debt.

In pursuance of this authority, the City Council passed an ordinance directing the Mayor and Comptroller to sell the bonds, wherein they pledge the faith and credit of the city for the payment of the principal and interest, and the revenue derived from wharfage is likewise pledged for the same purpose.

By the act of 1872, all acts which in any manner authorized a municipal corporation to collect a wharfage or tonnage tax were repealed.

The court below held the act unconstitutional, as impairing the obligations of a contract, and gave judgment for the plaintiff, who sued the defendant for refusing to pay wharfage.

As this case now stands, it is difficult to perceive how any

question as to the constitutionality of the law can be raised. In the passage of the law it cannot be pretended, that the State made a direct and irrevocable contract with the city. The city possesses no power which is not delegated by the sovereign authority of the State. The State, in the enactment of the law, granted to the city a privilege, but it did not divest itself of the power of repealing or withholding that privilege at pleasure. The city can only raise money and apply it to a particular purpose by virtue of delegated authority, and the same authority that grants the power may alter the law and divert it to a different object.

*In the case of the State *ex rel.*, The Police Commissioners, etc., vs. The St. Louis County Court (34 Mo., 546), it was held that the acts of the Legislature providing the objects for which county funds can be appropriated, are at all times subject to repeal or alteration, so as to appropriate the funds in a manner or to objects different from those before provided; and that, while the Legislature cannot take from the county its property, it has full power to direct the mode in which the property shall be used. If this proposition is conceded as to property already possessed by a corporation or minor subdivision of the State, it is certainly stronger when applied to a case where nothing is reduced to possession and only exists in the future.

Gilman vs. The city of Sheboygan (2 Black, 510,) is a case very nearly parallel with the one at bar. There the Legislature of Wisconsin passed an act, authorizing the city of Sheboygan to borrow money upon the credit of the city, to be invested in the capital stock of a railroad company. The act further provided, that the city should annually levy a tax upon all taxable property of the city, sufficient, in addition to the dividends upon the shares of its stock in the company, to pay the interest upon the bonds.

Under the act in question, the city made loans and issued its bonds therefor. Subsequently, an act was passed by the Legislature providing that thereafter all taxes levied by the Common Council of the city, for the payment of principal or

interest of any bonds issued to aid in the construction of the railroad, should be levied on the real estate of the city exclusively. It was contended there as here, that the act exempting personal property from levy and taxation, was an impairment of the contract with those who owned the bonds, and was therefore void. The bondholders, however, were not parties to the suit nor did they complain. But the Supreme Court of the United States, through Mr. Justice Swayne, who delivered their unanimous opinion, discountenanced this assumption and held otherwise in the following emphatic language. "The act of 1854 authorized the borrowing of money, the issuing of bonds, and the levying of a tax upon all the property in the city for the purposes specified. The imposition, modification and removal of taxes and the exemption of property from such burdens, is an ordinary exercise of the power of State sovereignty. There is no pledge, express or implied, that this power should not thereafter be exercised.

"Admitting that the State could enter into such an engagement, there is no evidence that it did. This fact should never be assumed unless the language used be too clear to admit of doubt.

"If the agreement existed, the complainant is not in a position to make the question. There is no allegation that the tax levied is insufficient. We hear of no complaint from the bondholders. They are not before us. It does not belong to the complainant, vicariously to enforce their contract and protect their rights."

So in this case, if we admit that the State could enter into an engagement which it could not lawfully repeal, still the case does not show that such was clearly the intention.

It is true the act authorizes the city to pledge and appropriate the revenues of the wharf for the payment of the principal and interest on the bonds, but this amounts to a legislative direction only, and is not conclusive that the Legislature intended to tie up its hands and take away the power of repeal.

In the next clause different language is used, and it is declared, that the tax levied upon all property made taxable by

law for State purposes, within the city, shall be held sacred for the purpose of paying the debt and interest. This shows that the revenue, accruing under this general power of taxation, was to be used for the purposes specified, and no other. It does not appear from the record that the revenue, arising from the tax imposed on all the taxable property, is insufficient to meet the liabilities incurred. The bondholders are not before us. They make no complaint. They are not presenting any claim that their security is impaired, and the plaintiff cannot complain for them and attempt to enforce their contract or protect their rights, when they have not seen proper to do so. The repeal of the law may have worked injustice, but we cannot interfere on that account, but were the bondholders here asking for a protection of their rights, and showing that the collection of their debts were impaired, a different case would be presented.

The case of *Von Hoffman vs. City of Quincy* (4 Wall., 535) is not in opposition to these views. There the proceeding was instituted by the bondholders themselves, and it appeared that the repeal of the law not only lessened their security, but it amounted to a direct denial of all remedy. The city of Quincy issued the bonds under the provisions of several acts, by which it was authorized to collect a special annual tax upon the property, real and personal, therein, sufficient to pay the annual interest upon any bonds thereafter issued for railroad purposes. The city failed to pay the coupons held by Von Hoffman for a long time after they became due, and he brought suit and obtained judgment upon them. An execution was issued, and returned unsatisfied. The city neglected and refused to levy the requisite tax to satisfy the execution, and he prayed for a mandamus to compel the city and its officers to pay over the amount of its judgment, and if the money was not in their hands, to levy a special tax as required by the acts of the Legislature before referred to. To the writ the city filed a return, pleading a subsequent act of the Legislature restricting the city from levying taxes beyond a certain prescribed amount, and stating that the limit had been exhausted,

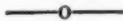
St. Ferdinand Loretta Academy v. Bobb.

and that no money remained in the Treasury which could be applied to the relator's demand, and that it was prohibited from making any additional levy.

Under these circumstances the Court awarded a peremptory writ and held that a subsequently passed statute which repeals or restricts the power of taxation previously given, in so far as it affects bonds bought and held when the repealed law was in force, was a nullity, and that it was the duty of the corporation to impose and collect the tax in all respects as if the second statute had not been passed.

In that case, it will be observed, the second statute took away all the rights of the bondholders to have any satisfaction whatever. The contract was left in full force, but the remedy was entirely withdrawn. It was equivalent to giving them a mere shadow and withholding the substance. They had no other fund to look to, and when that was taken away their claim might as well have been annihilated.

But in the present case there is another fund sacredly pledged for the payment of the principal and interest of the bonds, which has not been touched or interfered with, and for aught we know, it is entirely adequate to satisfy the indebtedness. Should this, however, turn out otherwise, and the fund remaining prove insufficient, then the bond-holders, at their own instance and upon their own application, might have the same remedy that was pursued in Von Hoffman's case. But the question is not before us, and of course no decision is given. For these reasons I think the judgment should be reversed. The other Judges concur.



ST. FERDINAND LORETTO ACADEMY, Respondent, *vs.* CHARLES BOBB, Appellant.

1. *Infant—Sustenance—Stepfather—Liability—In loco parentis.*—Merely by virtue of his marriage a man is not bound to provide for the children of his wife by a former husband, but if he holds them out to the world as members of his own family, he stands *in loco parentis* to them, and incurs the same liability with respect to them, that he is under to his own children.

St. Ferdinand Loretta Academy v. Bobb.

*Appeal from St. Louis Circuit Court.**Lackland, Martin and Lackland*, for Appellant.

In the absence of special statutes to the contrary, the father in law is not obliged to maintain his step-children. (Schouler's Domestic Relations, 321; Commonwealth vs. Hamilton, 6 Mass., 273; Freto vs. Brown, 4 Mass., 675; Worcester vs. Marchant, 14 Pick., 510; Tubb vs. Harrison, 4 T. R., 118; 2 Kent Com., 192; Freto vs. Brown, 4 Mass., and in addition to the cases above cited, see the case of Gay vs. Ballou, 4 Wend., 403.)

The defendant never assumed any control over the step-daughter at all, and did not stand *in loco parentis*.

Bakewell & Farish, for Respondent.

If a man marry a widow, he is not bound to maintain her children, unless he holds them out to the world as part of his family, in which case he is liable. (Schouler's Domestic Relations, 77; Stone vs. Carr, 3 Espinasse, 1; Cooper vs. Martin, 4 East., 75.)

EWING, Judge, delivered the opinion of the court.

This was an action to recover a sum of money, which is claimed to be due for board and tuition furnished by plaintiff to one Adaline Frazier, the daughter of the defendant's wife. The defendant admits in his answer, that his said step-daughter Adaline was a pupil at said Academy for some time, but denies that he placed her there, or authorized any one to do so, and denies any indebtedness whatever.

The testimony tended to prove, that the daughter was at the Academy from March, 1866, to June 1867, as a pupil, that her mother was married to defendant when Adaline was about twelve years old, and that she lived in defendant's family with her mother, as a member of the family, from that time until her marriage; that she was occasionally at home during her pupilage at the Academy; that she inherited some money from her father's estate, which was received by her mother after her marriage with defendant; that the Superior

of the Academy was informed by Adaline's mother, when she placed her at school, that she would receive said inheritance from her father's estate, out of which it was intended to pay for her tuition; that a part of the tuition bill was paid by her mother; that defendant was not consulted in reference to the education of his step-daughter, and took no control of it.

The court refused to give the following instructions asked by the defendant.

1. That if at the time Adaline was placed at the Academy, the contract between the Academy and her mother was, that the latter should receive board and tuition, and all necessities at said institution, and that the same were to be paid for out of moneys coming to said Adaline from the estate of her father, the verdict should be for the defendant.

2. That if the said Adaline was the step-daughter of the defendant, he is not liable, unless he held the said Adaline out to the plaintiff as a member of his family at the time the contract was made.

3. That if the services set out in the petition were rendered at the request of the mother of said Adaline, and not at the request of the defendant, they will find for the defendant.

The court refused to give these instructions, and gave the following, namely:

"If the jury believe from the evidence, that Ada Frazier, the daughter of the defendant's wife, was a member of his family, and by him held out to the world as such: that defendant knew that she was placed at the school of plaintiff, and made no opposition thereto, that her education there and its expense were such as were reasonably suited to the means and social position of the defendant, that the services were rendered and the charge reasonable, they will find for plaintiff such amount as they shall find from the evidence to be still unpaid."

The only questions in this case arise upon the instructions given and refused. The first instruction asked by the defendant was properly refused, because it was not warranted by the

evidence. There was no evidence of an AGREEMENT between defendant's wife and the plaintiff, that the tuition and board of Adaline were to be paid for out of the moneys coming to her from the estate of her father, or that she was taken into the Academy on the faith of any assurance of payment from that source. But if the daughter had a fund or an estate of her own, whether it could have been subjected to the payment of the debt does not and could not arise in this case; this is an action at law, and the question is, whether after his marriage with the mother, defendant assumed such a relation to the daughter as to create a *legal* liability to the plaintiff for the necessaries furnished her. If he did, the law implies a promise to pay for them, if the facts supposed in the instructions are true; and the averment of the petition, that they were furnished at defendant's request, is sustained by proof of such liability, without an express promise of payment or an express contract to that effect before the step-daughter entered the Academy. The propositions submitted in the other instructions, are involved substantially in that given for the plaintiff, and they will be considered together.

There is some conflict between the earlier English decisions on this subject; some of them affirming and others denying any liability of the step-father for the education and maintenance of the children of his wife by a former husband; while the former are not quite agreed as to the grounds and principles upon which it rests. The doctrine on the subject however, seems to be well settled, upon the authority of subsequent cases in England, as well as the decisions of the courts of this country. There is no obligation on the part of the step-father to provide for the children of his wife by a former husband, by virtue merely of his marriage with their mother. He may refuse to provide for them, and could not be compelled to do so. The liability in such cases depends upon the relation he chooses to assume in reference to them. If he holds them out to the world as members of his family, he stands *in loco parentis*, and incurs the same liability with respect to them, that he is under to his own children. And the presumption

in such case is, that they deal with each other as parent and child, not as master and servant. This relation being established, the reciprocal rights, duties and obligations pertaining to it arise between them, the same as if he were their natural father.

In *Stone vs. Carr*, 3 Espinasse, 1, Lord Kenyon referring to cases which were supposed to establish a different doctrine, says there is no doubt if a man marry a woman having children by a former husband, he might refuse to provide for them, and could not be required to do it; but if he did not refuse to entertain them, and took the children into his family, he thereby stood in the place of a parent as to them, and having gone abroad and left them in the care of his wife, he should be held bound by her contracts made for their maintenance and education. And he adds; had their father died insolvent, it would not alter the case.

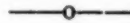
In *Cooper vs. Martin*, 4 East., 75, which was an action by the step-father against the step-son for expenses of his maintenance during his minority, which he promised to pay after he became of age, Lord Ellenborough, C. J., while holding that there was a good consideration for the promise, and that the action was maintainable, says in alluding to the case of *Stone vs. Carr*, *supra*, that however the case might be as between father-in-law and child, yet as to third persons the step-father was bound by the acts of his wife in providing for the children, whom he held out to the world as part of his family, that the step-father would have been liable to the tradesmen who supplied the children with necessities by his wife's orders, while they were living with him as part of his family. A *quasi* parental relation may be established, and one may stand *in loco parentis* to another, and thus become responsible for the maintenance and education of step-children on the principle, that the child is held out to the world as part of his family. (Schouler's Domestic Relations, 321.)

To the same effect are the cases of *Williams vs. Hutchinson*, 3 Comstock, 312, 321, and *Brush vs. Blanchard*, 18 Ill., 46. See also *Lantz vs. Frey*, 14 Penn. St., 201. The ques-

Clemens v. Dryden et al.

tion, in the form in which it is presented in the case at bar, has not heretofore been passed upon by this court that I am aware of.

Judgment affirmed. The other Judges concur.



JAMES CLEMENS, JR., Appellant, *vs.* THOMAS A. DRYDEN, *et al.*, Respondents.

Willi vs. Dryden, ante, p. 319 affirmed.

Appeal from St. Louis Circuit Court.

W. B. Thompson and Cline, Jamison & Day, for Appellants.

Dryden & Dryden for Respondents.

WAGNER, Judge, delivered the opinion of the court.

This case is not distinguishable from the case of *Willi vs. Dryden, et al.*, decided at the present term. In conformity with the principles there laid down, the judgment must be reversed and the cause remanded. The other judges concur.

Seibel v. Simon.

CONRADE SEIBEL, Respondent, *vs.* FERDINAND SIEMON, Appellant.

1. *Mechanics Lien—Judgment—Removal of buildings—Action for Prevention—St. Louis County.*—If the owner of property in the County of St. Louis prevents the purchaser of a building thereon, under a judgment on a mechanic's lien, from removing the building, his proper remedy is an action for damages against the owner of the property.

Appeal from St. Louis Circuit Court.

Slayback & Haussler, for Appellant.

If plaintiff has any rights by the sale, it is a legal title, and if so he must come into a court of law for relief.

Edward C. Kehr, for Respondent, cited: *Deters vs. Renick*, 37 Mo., 599; *Otley vs. Haviland*, 36 Miss., 19; *Raymond vs. Ewing*, 26 Ill., 343; *North Presbyterian Church vs. Jevne*, 32 Ill., 214; *Whitenack vs. Noe*, 3 Stockton, 321; *Newark L. & C. Co. vs. Morrison*, 2 Beasley, 133.

The court may grant any relief consistent with the case made, and the allegations of the petition. (*Northcraft vs. Martin*, 28 Mo., 469; *Easley vs. Prewitt*, 37 Mo. 361.)

VORIES, Judge, delivered the opinion of the court.

This suit was brought in the St. Louis Circuit Court by Seibel, the plaintiff, a purchaser under a judgment to enforce a mechanic's lien, against the owner of the lands upon which the erection or improvements were made, to recover the value of the improvement made, or to otherwise enforce his rights. The petition filed by plaintiff is as follows:

"Plaintiff states that by deed dated the 16th day of November, 1863, and recorded in the Recorder's office of St. Louis County, Theobald Eckerle became the owner in fee of a lot or parcel of land in the city and County of St. Louis, and State of Missouri, hereinafter specifically described, that on the same day said Eckerle and wife, by deed bearing that date, conveyed said real estate to D. Robert Barclay in trust to secure to Elihu H. Shepard or order the payment of certain promissory notes in said deed described, that among other things in said deed of trust contained it was provided, that

if said notes should be paid according to their tenor or effect, then said deed should be void, but that if default were made in the payment thereof, then said deed should remain in force, and the said Barclay might proceed to sell said property in manner as said deed directs, and deliver to the purchaser thereof a deed in fee simple of the property sold.

"Plaintiff states, that said Eckerle entered into possession of said premises about the time of his said purchase, and thereafter continued in the possession and actual occupancy thereof, until about the 31st day of May, 1871. That whilst so in possession of said premises as the owner thereof, said Eckerle caused a certain building 43 feet in length by 34 feet in width, and about 26 feet deep, constructed of rock and brick, and intended for an ice house, to be erected on said premises, that he commenced work on said building on or about the 1st day of October, 1870, and finished the same on or about the 8th day of January, 1871, and that between said dates, and at his instance and request, Andreas Uhri, Conrad Seibel, Theodore Bloess, Henry Hilsdorf and Clemence Knupfer, each contracting severally with said Eckerle, did work and labor upon, and furnished materials for said building, that their respective demands for the work done and the materials so furnished remaining unpaid, they did each on or about the 28th day of January, 1871, file and perfect in the Clerk's office of the Circuit Court of St. Louis County, a lien upon the above described property, in accordance with the statute in such case made and provided.

"Plaintiff states, that on the 3rd day of February, 1871, the said Andreas Uhri, Conrad Seibel, Theodore Bloess, Henry J. Hilsdorf and Clemence Knupfer, did each institute suits upon his said demand and lien in the Circuit Court of St. Louis County against the said Eckerle, and the property hereinafter described, and that in said several suits such proceedings were thereafter had in said Circuit Court, that on the 18th day of May, 1871, said several plaintiffs recovered judgments against said Eckerle for the amount of their respective demands and costs, with special judgment and execution upon their said

lien against the premises, hereinafter described, that said several judgments remained in full force, not in anywise vacated or reversed, and that on the 5th day of August, 1871, an execution in conformity therewith was issued on each of said judgments from the Clerk's office of the Circuit Court of St. Louis County, directed to the sheriff of said County, and returnable to the October term, 1871, of said court, that under and by virtue of said several executions, said sheriff, not being able to find any other property belonging to said Eckerle, did levy upon and seize the property charged with said several liens and in said executions described as follows, to-wit: A certain building 43 feet in length by 34 feet in width and about 26 feet deep, constructed of rock and brick, and intended for an ice house, and the ground whereon the same is situated, being the following described lot or parcel of land in the city and County of St. Louis, and State of Missouri, to-wit: Being a lot of land situated in block numbered sixty-five of the St. Louis Commons, commencing at a stone ten feet south of the north line of said block, and twenty-five feet eastwardly from the west line of said block, thence running eastwardly parallel with the north line of said block one hundred and seventy-five feet, thence southwardly along Capital Avenue, on a line parallel with the west line of said block six hundred feet and seven inches, thence westwardly along Magazine street, in a line parallel with the north line of said block one hundred and seventy-five feet to a strip of ground twenty feet wide, to be used as an alley, thence northwardly parallel with the west line of said block and twenty feet eastwardly from it six hundred feet and ten inches to the place of beginning, being block No. 1,665 of the city of St. Louis, and having advertised the same according to law, said sheriff did on the 2nd day of September, 1871, expose said premises for sale, and the plaintiff being the highest and best bidder therefor, said property was sold to him by said sheriff, who, on the same day, executed and delivered to the plaintiff a deed for the same, which is herewith shown to the court.

"And plaintiff states that previous to the date last aforesaid,

to-wit: on the 31st day of May, 1871, the real estate herein before described, was exposed to sale under the deed of trust of November 16th, 1863, herein before recited, with the announcement that it was sold subject to all mechanic's liens and all taxes on the same, and that at said sale the defendant, Ferdinand Siemeir, became the purchaser thereof, subject to such liens and taxes; that he immediately thereafter entered into possession of said premises, including said ice house, and on the 13th day of September, 1871, was, and now is in possession of said building.

"Plaintiff says he is advised that the several liens hereinbefore recited attach to the building known as the ice house, herein before described, in preference to the prior lien of the deed of trust first herein recited, and under which the defendant Simeon derives title to said real estate, if any he have, and that by reason of the several facts aforesaid plaintiff, on said 2nd day of September, 1871, became and now is the owner of said building, and entitled to remove the same, that on the 14th day of September, 1871, he demanded of the defendant permission to enter said premises for the purpose of removing said building, and demanded of him possession of said building, with a view to remove the same, but that defendant then refused and still refuses to permit him so to enter upon said premises or into said building to remove the latter, but that said defendant Siemon has converted and appropriated said building to his own use.

"Plaintiff states, that said building is, and on said 13th day of September, 1871, was, of the value of three thousand dollars, that the monthly rents and profits thereof are fifty dollars.

"Plaintiff states that on the 25th day of July, 1871, the defendant Siemon and Auguste, his wife, executed and delivered their certain deed of date aforesaid, and recorded in the Recorder's office of St. Louis County, in book 435, page 292, by which they conveyed the real estate hereinbefore described to the defendant, Haeussler, in trust, to secure to the defendants, Leonard Benecke, Adolph Bush, and Morris Lippman, the payment of certain notes in said deed mentioned, and the

defendants Haeussler, Benecke, Bush and Lippman now claim an interest on said premises by virtue of said deed."

The plaintiff then prays for a judgment for three thousand dollars, the value of the ice house, with interest thereon, or that the court ascertain the value of the building and adjudge and decree the same to plaintiff with interest, &c., and to adjudge and decree a sale of the real estate described with the buildings and improvements thereon, and that said premises be sold, and of the proceeds, that plaintiff be paid the value of the building, and the remainder paid to defendants according to their respective rights, &c.

The defendant Siemon demurred to this petition, because it did not state facts sufficient to constitute a cause of action. Because from the showing in the petition, plaintiff had no other remedy in law than by an action for the claim and delivery of the materials in said ice house, or an action at law against the defendant for the conversion of the materials of which it is composed. That plaintiff could only have a right to remove the house in a reasonable time, &c.

The other defendants filed a separate demurrer which it is not necessary to set out.

The demurrers were sustained at Special Term, and plaintiffs failing to amend or further plead, final judgment was rendered against him, from which he appealed to the General Term of said court. Afterwards at the General Term of said court, the judgment of the Special Term was in all things reversed and the cause remanded; from this last judgment the defendants appealed to this court.

There was some controversy in the argument of this case, whether the action was an ordinary action at law, or was a petition in the nature of a bill in equity, addressed to the court as a court of chancery.

It was contended by the plaintiff, that although in the prayer of the petition he prayed alternately both for legal and equitable relief, that the prayer did not determine the nature of the action, but that the court would look at the body of the petition, and from that determine its nature and give the

appropriate relief. Testing the petition in this case by this rule, it is essentially an equity proceeding, the whole bill being framed with a view to equitable relief.

This being the case, if it is shown in the bill by the facts charged and relied on, that the plaintiff has a plain and adequate remedy at law, then his bill in equity must fail, notwithstanding he may as one part of the prayer in his petition ask for a judgment at law, for as we have before stated, it is the body of the petition and not the prayer, that determines its character.

The plaintiff however insists, that the facts stated in his petition entitle him to equitable relief, and we are referred to the cases of *Andry vs. Guyol, et al.*, 13 La., 8, and *Raymond vs. Ewing, et al.*, 26 Ill., 329. The first named case was brought by a mortgagee to sell the mortgaged premises, and one Miller intervened, and claimed that he had a special lien on the proceeds of sale for an amount due him for lumber and materials furnished to the defendant or mortgagor, for building a house on the land, which was sold by the Sheriff upon foreclosure of the mortgage. It was held by the court, that inasmuch as the house had been sold by the mortgagee upon which Miller's lien attached, that he had a right to intervene and receive a part of the proceeds of the sale. The other case was a case of *Ewing et al.*, who filed a bill to enjoin the sale of certain premises, upon which they had a mortgage, under a prior decree of the same court under a proceeding to enforce a mechanic's lien. The charge in the bill is, that the lien of the plaintiff's mortgage is prior in point of time, and a superior lien to that of Miller. The court held in that case, as *Ewing & Co.* were not parties to the lien suit, they were not bound by the decree, and might contest it by the mode adopted. And the court further expressed the opinion, that as the court had possession of the case for the purpose of granting the injunction, it should have gone on and settled the rights of the parties. "The deed of trust constituted a first lien upon the premises and improvements thereon at the time the trust deed was recorded, but the statute gives the

mechanic and material men, liens paramount to the trust deed upon the improvements made by them upon the premises, and the court should have ascertained the value of these improvements as compared with the whole value of the premises, and given to the petitioners in the lien suit their due proportion of the proceeds of the premises according to the provisions of the statute." It will be observed, that this last case is very different from the one under consideration. There the court enjoined the sale under the mechanics' lien, so as to settle the rights of two contending liens on the premises before any sale was made, so that each party should get their proper proportion of the proceeds of the property. The court would not permit a sale to go on, and the proceeds to be disposed of, until the rights of the parties to the proceeds were fixed, and in this way to prevent a sacrifice of the property, and a cloud being placed on the title. In the case we are considering, the mischief is done, if mischief it is, a sale has taken place both under the deed of trust and under the mechanics' lien, the proceeds of each sale have been disposed of, there are no equities to settle; at least there are none if the plaintiff's bill be true, and it is not denied. The defendant, who purchased under the deed of trust, not having been made a party to the suits to foreclose the mechanics' liens, might contest the regularity or fairness of the judgments rendered therein, but until he does so, the judgments are not void, but are presumed to be binding, at least in the present attitude of this case,—the demurrer admitting the allegations in the petition,—the judgments under which plaintiff purchased, are taken to be binding. (*Schaffer vs. Lohman, et al.*, 34 Mo., 68.)

The 3rd section of our statute concerning Mechanics' liens provides, that, "The lien for the things aforesaid or work, shall attach to the buildings, erections or improvements for which they were furnished, or the work was done, in preference to any prior lien or incumbrance or mortgage upon the land upon which said buildings, erections, improvements or machinery have been erected or put; and any person enforcing such lien may have such building, erection or improvement

sold under execution, and the purchaser thereof may remove the same within a reasonable time thereafter."

This act it will be seen, is very different from the act of 1856, regulating Mechanics' liens in St. Louis County, under which last named act the case of *Bridwell vs. Clark*, 39 Mo., 170, referred to by defendant, was decided; that act is now repealed, and the section above quoted is now the only law applicable to such case. If then the plaintiff, by virtue of his purchase at execution sale acquired any right, it was the right to remove the building upon which the mechanics' lien attached. If the defendant Siemon, wrongfully prevented him from removing the house, his remedy would be an action to recover damages for the wrongful act of defendant.

The court at Special Term therefore properly sustained the demurrers of the defendant, and rendered judgment thereon.

The judgment of the General Term, reversing the judgment of the Special Term and remanding the cause, ought to be reversed.

The other Judges concurring, the judgment of the General Term is reversed.

J. J. PHILLIPS, Respondent, *vs.* JAMES M. FRANCOISCUS, *et. al.*,
Appellants.

1. *Trusts and trust funds—Bank deposits—Consent of—cestui que trust—Transfer of certificates of deposit.*—A. owing B. money on collections, made a special deposit of that amount in a bank, subject to his own order which he intended for B. *Held*, by the consent of B. to this action, the money became his, and after the indorsement of the certificate of deposit to him, his title thereto became complete at law.

Appeal from St. Louis Circuit Court.

Krum & Patrick, for Appellants.

Lee and Adams, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

Ira Stansberry, Sen., collected for plaintiff some bills of exchange, and after payment of certain amounts, out of the proceeds, there was left in his hands a balance of \$388, to the credit of plaintiff. Stansberry took of his own money consisting of United States Treasury notes, the sum of \$388, and put the same in an envelope, and had it sealed up with his name indorsed thereon, and made a special deposit of this package with the defendants, who were bankers, and who received this package on special deposit, and gave Stansberry a certificate of deposit, which specified that it was to be delivered to Stansberry or to his order on demand.

The said Stansberry indorsed the certificate, ordering the package to be delivered to the plaintiff. The plaintiff demanded the package, and the defendants refused to deliver it to him, and he brought this action for the recovery of the same, or its value.

On the trial, Stansberry testified to the effect, that he made the special deposit as a trust fund for the plaintiff, and transferred it to him as, and for the balance of the money he had collected for him.

The defendants set up as a defense, that Stansberry after making this special deposit, and before the same was assigned to plaintiff, had made a general assignment of all his property for the benefit of his creditors, and that this package passed to the assignee, by virtue of the assignment. The assignment was read in evidence, and this package was not referred to in terms, or by implication. His stock of goods, &c., in a certain store was covered by the assignment, but not the package in question.

The facts of this case clearly indicated, that the plaintiff was the real owner of the package, and that the special deposit was made for him as a trust fund by Stansberry.

After giving his assent to this disposition of a debt that was due him, the money so deposited in trust became his property, and the transfer of the certificate of deposit to him, made his title complete at law.

 Brothers v. Cartter et al.

The defendants had no right to detain this deposit. The only question in the case was, whether the plaintiff was the owner of the package, and all the instructions asked by the defendants raising other questions, were properly refused. I see no error in the records.

Let the judgment be affirmed, Judge Wagner absent. The other Judges concur.

— o —

WILLIAM BROTHERS, Respondent, *vs.* MILO S. CARTTER, *et al.*,
Appellants.

1. *Servants—Negligence of co-servants—Master, liability of.*—The master is not liable for injuries received by a servant, caused by the negligence of a co-servant, unless the latter is not possessed of the ordinary skill and capacity for the business intrusted to him, and unless his employment is attributable to the want of ordinary care on the part of the master.
2. *Master—Delegation of his authority—Injury to servant.*—When a Master delegates to a superintendent the power to employ and discharge servants and to provide and remove material, which duties adhere to him as master, he thereby makes himself liable for any injuries sustained by his servants, caused by the lack of care or negligence of such superintendent.

Appeal from St. Louis Circuit Court.

Lackland, Martin & Lackland, and Dryden & Dryden,
for Appellants.

I. The plaintiff could judge of the sufficiency of the braces, and other timbers, as well as the defendants. In such cases the master is not liable. (*Williams vs. Clough*, 3 H. & N. 259; *Dynen vs. Leach*, 26 Law Journal, [N. S.] Exch., 221; *Wright vs. N. Y. Cent. R. R.*, 23 N. Y., 566; *Hayden vs. Smithville Manuf'g Co.*, 29 Conn., 548; *Griffith vs. Gidlow*, 3 Hurlst. & Norm., 648; *Devitt vs. Pac. R. R.*, 50 Mo., 302; *Warner vs. Erie R. R. Co.*, 39 N. Y., 470; *Ormond vs. Holland*, El. B. & El., 100.)

II. The evidence showed that the failure to supply was the act or omission either of Graham or Logan. They were fellow

servants with plaintiff. The doctrine claimed by plaintiff's counsel, that a superintendent, such as Graham, is a "representative," or "*alter ego*" of the master, is not well founded. (Wilson vs. Merry, 1 Scotch & Div., Appeals 326; Feltham vs. England, 2 Queen's B., 32; Gallaher vs. Piper, 16 C. B. [N. S.] 680, and note to same; Searle vs. Lindsay, 11 C. B. [N. S.] 430; Wigmore vs. Jay, 5 Exch., 354; Albro vs. Awagam Can. Co., 6 Cush., 75; Wright vs. New York Cent. R. R., 25 N. Y., 562; Warner vs. Erie R. R. Co., 39 N. Y. 470; Faulkner vs. Erie R. R., 49 Barb. 324; McDermott vs. Pacific R. R., 30 Mo. 115; Caldwell vs. Brown, 53 Pa. St., 453.)

III. The duty of finding, selecting, and furnishing the materials necessary for a work, is one which the master must very often entrust to his servants. He cannot give personal attention to that part of the business, any more than he can to the details of the application of the material furnished. He can no more foresee and prevent the neglect of his servants in furnishing than he can their neglect in applying. The fellow servant can foresee such neglect as well as the master, and takes the risk of it. (Wright vs. N. Y. Cent. R. R., 25 N. Y. 572; Gallaher vs. Piper, 16 C. B. (N. S.) 680; Warner vs. Erie R. R. Co., 39 N. Y., 470; Priestly vs. Fowler, 3 M. & W., 1.)

Steward & Wieting, for Respondent.

The master cannot evade his responsibility by delegating to another the power to employ and discharge servants and to provide suitable materials. (Shearman & Redfield, on Negligence § 102; Gibson vs. Pacific R. R., 46 Mo., 163; Harper & Indianapolis R. R., 47 Mo., 567; 45 Ill., 201; 52 Ill., 183; 22 Ala., 294.)

WAGNER, Judge, delivered the opinion of the court.

This was an action for damages received by the plaintiff while in the employ of defendants in the construction of a bridge across the Aux Vasse river, in the County of Callaway, Missouri, for the Fulton and Jefferson Branch of the Louisiana and Missouri Railroad. The material averment in the

petition is, that while plaintiff was at work on the bridge, one span fell, and plaintiff was precipitated a distance of seventy-three feet upon the rock and debris beneath, and was thereby seriously injured.

The cause of the falling of this span of the bridge is alleged to have been the insufficiency in amount and quality of the bracings and false work used in the construction of the span, that defendants failed to furnish proper and sufficient material for the erection of said structure, and because of the removal by defendants of supports and bracings, which had been furnished for this purpose, to make the structure safe and secure during its construction; and that defendants well knew of the insecure condition of the structure and of the deficiency and insufficiency of the materials furnished for the same and of the dangerous condition of the structure, and that in consequence of defendants' negligence and recklessness in and about the premises, plaintiff was injured, &c.

The plaintiff gave evidence strongly tending to prove his averments.

It appears that the defendants did not personally have charge of the work, and what they knew of its character and condition was from being about it occasionally during its progress.

They did not attend personally to the purchase and collection of materials, or to directing the construction. The former duties were committed to the superintendent Graham, and the latter to the foreman Logan.

The Jury rendered a verdict for the plaintiff, and as there was ample evidence to support it, of course this Court will not interfere, unless they were misled by wrong instructions.

The instructions given for both parties taken together fairly presented the law, and the second instruction given for the plaintiff is the only one that is seriously complained of here. That instruction is, as follows: "If the Jury find from the evidence that one John Graham was the Superintendent for defendants of the work on the bridge in question, and as such had entire control and charge thereof with power to employ

and discharge hands, and to provide and remove material, and that said Graham was the representative of defendants in the construction of said bridge, and that plaintiff was subject to his orders and directions, then the Jury are instructed that said Graham was not a fellow servant with the plaintiff, and that his acts and conduct in connection with said bridge were and are the acts and conduct of defendants so far as this case is concerned."

The other instructions essentially lay down the law as it was declared by this Court in the case of *Gibson vs. Pacific Railroad Co.* (46 Mo., 163,) that where injuries to a servant were owing to improper or defective machinery or appliances used in the prosecution of the work,—the condition of which by reasonable and ordinary care and prudence the master might know,—and not to the lack of care and prudence in the servant, the master would be liable. That the legal implication was, that the employer would adopt suitable instruments and means with which to carry on his business, and if he failed to do so he was guilty of a breach of duty under his contract, for the consequences of which in justice and sound reason he would be responsible.

In that case we also held, affirming the cases of *McDermott vs. Pacific R. R. Co.*, (30 Mo., 115;) and *Rohback vs. Pacific R. R. Co.*, (43 Mo., 187;) that where injuries to servants or workmen happen through the negligence, misfeasance or misconduct of a fellow servant, no action therefor can be maintained against the master, unless the fellow servant is not possessed of the ordinary skill and capacity in the business intrusted to him, and unless his employment is attributable to the want of ordinary care on the part of the master.

The question then is, if Graham was defendants' Superintendent and had entire control of the work, with power to employ or discharge hands and to provide and remove material, whether he was a fellow servant within the meaning of the term. If a workman or servant is to work in conjunction with others, he must know that the carelessness of one of his fellow-servants may be productive of injury to himself, and he

must know that neither care or diligence by the master can prevent the want of due care and caution on the part of his fellow-servants. The servant on entering upon the employment is supposed to know and assume this risk. But does he risk the carelessness and negligence of those placed over him, in the selection of suitable materials, machinery and the appliances incident to the employment?

He acts in subordination. His simple duty is obedience. He has no means or opportunity of knowing, whether the articles furnished are safe, and has to rely on the judgment of his superiors.

If the master in person superintends the work, then there is no controversy or dispute as to where the responsibility belongs.

If the master deposes the superintending control of the work, with the power to employ and discharge hands and purchase and remove materials, to an agent, then the master acts through the agent and the agent becomes the master. The duties are the duties of the master, and he cannot evade the responsibilities which are incident and cling to them by their delegation to another. When the master appoints some other person to perform these duties, then the appointee represents the master, and though in their performance he may be and is a servant to the master, yet in those respects he is not a co-servant, a co-laborer, a co-employee, in the common acceptation of those terms.

He is an agent and stands instead of the principal, and is not a fellow-servant within the meaning of the rule as applied to laborers and workmen. His acts are the acts of a master and superior, and the servants are bound to use whatever materials, machinery, apparatus or appliances he may see fit to provide for them. This question was carefully considered in the case of *Harper vs. Indianapolis & St. Louis R. R. Co.*, (47 Mo., 567,) and decided in accordance with the doctrines above announced. In any view which I am able to take of the subject, I think that the instruction was right, and that the Judgment should be affirmed.

The other Judges concur, except Judge Sherwood who is absent.

HENRY J. MOORE, Respondent, *vs.* THE BANK OF COMMERCE,
Appellant.

1. *Alienation of property—By-law of bank prohibiting—Restraint of trade.*—The right of alienation is an incident of property, and a by-law of a bank prohibiting the alienation of stock therein, or putting restrictions thereon, is void, as being in restraint of trade.
2. *Estoppel—Bank stock, loan on—Officer of bank, representations of.*—An officer of a bank informed a party applying to the bank, that he might safely loan money on a pledge of their stock, to the owner of it, taking the stock as pledge: *Held*, that the bank was, after the loan was made, estopped to forfeit the stock for alleged dues.

Appeal from St. Louis Circuit Court.

A. M. Gardner, for Appellant.

The corporation had the right under its charter to prescribe the mode and form of the transfer of its stock, and unless that mode and form were complied with, or offered to be complied with, the company could not be held liable for a refusal to transfer. (*Marlborough Manufacturing Co. vs. Smith*, 2 Conn., 578; *Northrup vs. Newton & Bridgeport Turnpike Co.*, 3 Conn., 544; *The Oxford Turnpike Co. vs. Bunnell*, 6 Conn., 552; *Sargent vs. Essex R. R. Co.*, 9 Pick., 204.)

There was no official act done, or record made, of the alleged transaction between plaintiff and McClellan, by which the corporation could be informed of its character, or by which they could be supposed to be bound for all future time.

W. S. Pope, for Respondent, cited: 20 Mo., 382; 48 Mo. 136; *Mechanics' Bank vs. Merchants' Bank*, 45 Mo., 513; *Union Bank vs. Laird*, 2 Wheaton 390; *Bank of Utica vs. Smalley*, 2 Cow. 770; *Sargent vs. Franklin Ins. Co.*, 8 Pick. 90; *Quiner vs. Marblehead, Soc. Insurance Co.*, 10 Mass., 476; *Angel & Ames on Corporations*, §§ 567 and note 1, 569; *Tuttle vs. Walton*, 1 Kelley, (Ga.) 43; *Nesmith vs. Bank of Washington*, 6 Pick., 327; *Bank of Attica vs. Manufacturers and Traders' Bank*, 20 N. Y., 501; 2 Kent, Com., 11 Ed. 358 n. d.; 5 Barr, (Penn.) 345; 20 Wendell, 91; 11 Barb (N. Y.) 580; 10 Peters., 596, 612; 3 Howard, 483; 2 Kent Com., 634; 3 Bos. & Pull. 496; *Bates vs. N. Y. Insurance Co.*, 3 John. Cases, 238.

Moore v. The Bank of Commerce.

Plaintiff took the stock in pledge on the recommendation of defendant.

ADAMS, Judge, delivered the opinion of the court.

The defendant is a corporation created by an act of the Missouri Legislature of the 14th of February, 1857, under the corporate name of "The St. Louis Building and Savings' Association," and by a subsequent act of the Legislature its name was changed to "The Bank of Commerce."

In December 1860, Josiah G. McClellan was the owner of six shares of the stock of this Company, and applied to the plaintiff for a loan of \$700, and proposed to pledge this stock as security for the loan. The plaintiff before he would make the loan called upon the defendant to ascertain how this stock stood, and whether it was incumbered, and whether he might safely loan his money on the stock.

The officer in charge of the bank assured him that the stock was free from incumbrance, and that he might safely take it as security for the contemplated loan. Acting on this assurance the plaintiff loaned McClellan \$700, and took his note at four months, and took a transfer of the stock to a trustee to secure the loan, with power to sell the stock for payment of the debt, and afterwards extended the time four months longer on the note, still holding the stock as security for the payment of the note. McClellan failed to pay his note at maturity, and the trustee under the power of sale sold the stock, and the plaintiff bought it at \$600, and entered a credit for the amount of sale on the note. The plaintiff offered to pay all assessments on the stock, and after his purchase applied to the defendant to have the stock issued in his name, or transferred on the books of the Company to him. The defendant refused to comply with the plaintiff's demand on the alleged ground that the stock was held, at the time he took it, for debts due from McClellan, and had been forfeited therefor under the by-laws of the Company. The plaintiff thereupon brought this suit for damages, alleging his ownership as aforesaid of the stock, and the wrongful conversion of same by the defendant,

and claimed damages for the value of the stock at the time of the alleged conversion.

The defendant's charter authorized the transfer of stock in such manner as the Company might prescribe by its by-laws. The Company had made a by-law to the effect that the stock was personal property, and could only be transferred on the books of the Company.

The points raised and discussed here are chiefly, whether the transfer to the plaintiff under the trust sale passed any right or title to the stock in question, and whether, under the facts of the case, the Company had the power to forfeit the stock for assessments or debts due from McClellan.

1. The right of alienation is an incident of property, and a by-law prohibiting this right or imposing any restrictions on its exercise would be in restraint of trade and against public policy and therefor void. Whether the Legislature could authorize such restraint, is not involved in this record, and need not be passed on. The Company had the power, as a cumulative mode of transfer, to have it placed upon the books of the Company. But whether so entered or not, the title to the stock as between the former owner and the purchaser would pass by a sale or transfer by him or under his authority. (See the *St. Louis Perpetual Insurance Company vs. Goodfellow*, 9 Mo., 149 ; *The Chouteau Spring Company vs. Harris*, 20 Mo., 382.)

2. The facts of this case regarding the pledge of the stock to plaintiff, constitute an estoppel *in pais* against the defendant's right to forfeit the stock for unpaid dues from McClellan. The officer in charge of the Company's business assured the plaintiff, that the stock was unincumbered, and that he might with safety take it in pledge to secure a loan of his money to McClellan ; upon the faith of this assurance the plaintiff acted and made the loan. After thus inducing the plaintiff to part with his money, it would be a fraud on him to suffer the defendant to forfeit the stock for alleged dues. Whether the admission thus made by the agent of the Company was true or false, is not open for inquiry ; as the plaintiff acted on it in

Louisiana National Bank of New Orleans, v. Laveille, et al.

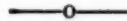
good faith, it must stand as an estoppel, which determines the rights of these parties." (See Taylor & Mason vs. Zepp, 14 Mo., 482.)

The court in this case refused all the instructions asked by both parties, and assumed to declare on its own motion the whole law as applicable to the case.

The instructions as given by the court seem to have presented the case fairly, and in my judgment very favorably for the defendant on all the points made by the evidence.

On the whole record the judgment appears to be for the right party.

Judgment affirmed. Judge Sherwood absent, and the other Judges concur.



LOUISIANA NATIONAL BANK OF NEW ORLEANS, Appellant, *vs.*,
THEODORE LAVEILLE, *et al.*, Respondents.

1. *Common Carriers—Liability—Bills of lading—Goods not received—Third parties.*—The owners of a boat are not rendered liable at the suit of a third party in consequence of a bill of lading having been issued for goods as shipped on board that boat by one apparently having authority therefor, to the consignor named in said bill of lading, who negotiated a bill of exchange drawn on the consignee to such third party, who purchases and has indorsed to him for value the bill of exchange on the faith and on the security of the bill of lading which is also transferred to him, without any knowledge or notice of lack of authority on the part of him who signed the bill of lading, or that the goods recited in the bill of lading were never shipped.

Appeal from St. Louis Circuit Court.

Sharp & Broadhead, for Appellant.

I. If Sinnoth and Adams were held out as agents to give bills of lading *generally* for the boat, and acted as such, and made the bill of lading, and plaintiffs purchased it innocently,—then although there were restrictions, in the instructions to them or in their authority, as between them and their principals, and they violated it; yet if plaintiff knew nothing of such

limitation or of its violation—he is not affected thereby.—The principals must account to plaintiff, and look to their agent for redress. (Story on Agency, § 126,—127 *et seq.*)

II. The defendants (by agent) having made, delivered and put in circulation, the bill of lading, it being purchased or advanced upon by an innocent third person, as to him they are concluded thereby, by their statement therein, that the goods had in fact been all shipped on board the vessel. (Dickerson vs. Seelye, 12 Barbours Sup. Ct. Reps., 99; Howard vs. Tucker, 1 Barnwell & Ad., 712, &c.; Strong vs. Grand Trunk Railway Co., 6 American Law Register, (N. S.) 680–681, &c.; Meyer vs. Peck, 28 N. Y., 590–597, &c.; See pp. 598–9; 1 Parsons on Maritime Law, 135–136–137, and note 2 at p. 137.)

Glover & Shepley, for Respondents.

If the master had signed this bill of lading, the property not being actually on board, no liability attaches to the owners, either to the consignee or to his assignee for value. (Goodrich vs. Norris, 1 Abbott Adm., 200; Mortell vs. Ship W. H. Rutan, Rose, Master; Int. Rev. Record Vol. I, p. 125; Grant vs. Norway, 2 Eng. Law & Equity, 337; Schooner Freeman vs. Buckingham, 18 How. U. S., 182; 1 Parson's Marit. Law, 135 and n. 2; Herbbbersty vs. Ward, 8 Exch., 330; Jessell vs. Bath, 2 Law Rep. (Exch.,) 267.)

The agent has no higher authority than the master and cannot bind owners where goods are not on board. (Gessel vs. Barth, 2 Law Rep. Exch., 267; per Chief Baron Kelley and Baron Bramwell.)

SHERWOOD, Judge, delivered the opinion of the court.

Action in the St. Louis Circuit Court, brought by the Louisiana National Bank against Theodore Laveille and others.

The petition in substance states that defendants were the owners of the steamboat Mississippi, and common carriers, engaged as such in carrying on said boat, property, merchandise, &c. between the port of New Orleans and that of St. Louis; that

Louisiana National Bank of New Orleans, v. Laveille, et al.

the defendants had their officers, agents, and employees, engaged in their said business at New Orleans, &c.; that on the 8th day of February, 1870, at said last mentioned port, and while said boat was at the same, defendants by their authorized agents executed and delivered to A. C. Wilbur & Co., a certain bill of lading of that date, in which was acknowledged the shipment by said Wilbur & Co., on said boat of eighty-nine drums of caustic soda in good order and condition marked "L. N. & Co.," consigned to the order of said Wilbur & Co., that by said bill of lading it was also agreed, that said caustic soda should, dangers of navigation &c., excepted, be delivered in like good order to the consignee at St. Louis; that the said agents were duly authorized to execute and deliver bills of lading at New Orleans in behalf of said defendants, and of the said boat; that thereupon said Wilbur & Co., with said bill of lading in their possession on the same day made their certain bill of exchange of that date at New Orleans directed to Lewis, Nanson & Co., at St. Louis, a mercantile firm at that place, and requested and ordered said drawees at ten days sight to pay to the order of said makers \$2,400; that said Wilbur & Co., sold and transferred by written indorsement and assignment said bill of exchange and said bill of lading thereto attached, to plaintiff, who took and purchased the same on the faith and security of said bill of lading, and in due time caused said bill of exchange to be presented at St. Louis to said drawees for acceptance, which was refused; said bill of exchange was duly protested and notification thereof given to said Wilbur & Co., and afterwards, at the proper time, said bill of exchange was duly presented to said drawees at St. Louis for payment, payment demanded, payment refused, and protest made for such refusal, and due notice given to Wilbur & Co.; that when the boat reached St. Louis plaintiff presented the bill of lading to said defendants and proper agents on said boat, demanded the delivery of the eighty-nine drums of caustic soda, but defendant only delivered five of said drums, and failed, and refused to deliver the residue; that said five drums were only worth

\$146.27, that being the amount plaintiff received therefor, but that the eighty-four drums, which defendants failed and refused to deliver, were worth \$2,456, that the same were not lost, nor their delivery to plaintiff prevented, by the danger, of navigation, &c., but only by the negligence and mismanagement of defendants their agents and employees; that no part of the bill of exchange, except the sum for which the five drums of caustic sold, had ever been paid on the bill of exchange; that Wilbur & Co., had become and were insolvent; that by reason of the premises and of defendants refusal to deliver said eighty-four drums of caustic soda, and of the negligence and mismanagement of defendants, their agents and employees, plaintiff was damaged in the sum of \$2,500, for which judgment was asked. The bill of lading referred to in the petition was signed, "per Sinnoth & Adams, agents-Jos. Cooper"

The defendants answered, denying, that they had any agents in New Orleans or elsewhere, except the officers of the boat, denied the execution and delivery by themselves or agents of the bill of lading to Wilbur & Co., and that it was ever agreed that the eighty-nine drums of caustic soda should be delivered at St. Louis; averred they had no knowledge &c., as to the acts of Wilbur & Co., or of plaintiff, respecting the alleged bill of lading, and the alleged bill of exchange; admitted the reception on their boat Mississippi, from Wilbur & Co., of five drums of caustic soda and their delivery to plaintiffs, but denied the reception on board the said boat of any more drums of caustic soda than the said five, which was the reason averred for the non-delivery of a greater number; denied that the eighty-four drums of caustic soda ever came on board the boat or into the custody of defendants their servants or agents, denied all mismanagement, negligence, liability, &c.

A jury was impanelled to try the cause, and testimony was introduced tending to show that the bill of exchange mentioned in plaintiff's petition was negotiated and purchased by the plaintiff from Wilbur & Co., through their broker, Fazened, in the usual course of business for full value and on the faith of

the bill of lading thereto attached ; that Sinnoth & Adams were the agents of the boat Mississippi at New Orleans at the time the bill of lading bears date, that only five drums of caustic soda of same marks destination and consignees as those mentioned in plaintiffs petition ever were received on board the boat ; that Sinnoth & Adams had power to sign bills of lading for the steamer Mississippi on the production of dray receipts, *i. e.* receipts signed by the receiving clerk of the boat, acknowledging the delivery of the goods therein specified ; that James Cooper the clerk of Sinnoth & Adams signed bills of lading for them, and had authority from that firm so to do, but only when dray tickets were produced ; but that he had no authority whatever to sign the bill of lading in question ; nor was there any evidence tending to show that fact, or that dray tickets were produced at the time of signing the bill of lading, nor that the eighty-four drums of caustic soda ever were received on board the boat.

Plaintiff, after the above testimony was in, offered in evidence the bill of lading and the indorsement of Wilbur & Co., thereon, which on being objected to by defendants was excluded by the Court, and plaintiff excepted.

Plaintiff then asked several instructions, looking to a recovery on the facts as proven, which instructions the Court refused to give, and plaintiff excepted.

The Court at the instance of defendants gave such instructions as precluded a verdict for plaintiff ; whereupon plaintiff excepted, took a non-suit with leave, &c., and after moving unsuccessfully to set aside the non-suit, and again excepting, this cause comes here by appeal.

The decision in this case will be an answer to this question :

Are the owners of a boat rendered liable at the suit of a third party, in consequence of a bill of lading having been issued for goods as shipped on board that boat by one apparently having authority therefor to the consignor named in such bill of lading, who negotiates a bill of exchange drawn on the consignee to such third party, who purchases, and has indorsed to him for value the bill of exchange, on the faith and

on the security of the bill of lading, which is also transferred to him, without any knowledge or notice of lack of authority on the part of him, who signed the bill of lading, or that the goods recited in the bill of lading were never shipped?

A brief examination of the authorities cited by both appellant and respondents having any special reference to the point in hand will therefore be made.

Justice Curtis in *Schooner Freeman vs. Buckingham, et al.*, 18 How. (U. S.) 182, says:

"If the signer of a bill of lading was not the master of a vessel, no one would suppose the vessel bound; and the reason is, because the bill is signed by one *not in privity* with the *owner*. But the same reason applies to a signature of a *master* made out of the course of his employment. The *taker assumes the risk* not only of the genuineness of the signature and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. * * * But the master of a vessel has no more apparent unlimited authority to sign bills of lading, than he has to sign bills of sale of the ship. He has an apparent authority if the ship be a general one, to sign bills of lading *for cargo actually* shipped, and he has also authority to sign a bill of sale of the ship, when in case of disaster his power of Sale arises. But the authority in each case arises out of, and depends upon a particular state of facts.

It is not an unlimited authority in the one case more than in the other, and his act in either case does not bind the owner, even in favor of an *innocent purchaser*, if the facts upon which his power depended did not exist; and it is incumbent on those, who are about to change their condition upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends."

To the same effect are *Grant, et al. vs. Norway, et al.*, 2 Eng. Law and Eq., 337; *Hubbersty, et al. vs. Ward*, 8 Exch., 330; *Francis T. Montell, et al., vs. The Schooner William H. Rutan*, and *Chas. C. Rose*, her master; (Reported in Intern. Rev.

Rec., Vol. I, p. 125.) Parsons, Mart. L., Vol. I, p. 135, and note 2.

All these were cases where proceedings were instituted by *third parties*, (to whom the bills of lading had been assigned or who had made advances thereon for value on the faith and security of those bills,) against the vessel, as libellants, or against the owners for damages arising from the total or partial non-delivery of goods mentioned in the bills of lading.

In *Montell vs. The Schooner William H. Rutan*, *supra*, (in which case are cited, 18 How. (U. S.,) 182; 19 do 82; 2 Eng. L. and Eq., 337; 29 *Ib.*, 323,) it is said:

"That a cardinal restriction which applies to this case is, that a master cannot subject a ship *in rem.*, much less his co-owners, to a responsibility for a safe carriage or delivery of cargo NOT ACTUALLY *laden on board* of it for transportation, in the lawful employment of the vessel. This principle is too firmly rooted in the doctrines of commercial jurisprudence to be subject to question in this country or in England.

"That as the libellants prove by the testimony of the master himself, that he executed the bill of lading with knowledge that the wheat was not on board at the time, the bill of lading was *nugatory and fraudulent* as to the vessel and all her co-owners, except the master himself."

The case of *Strong vs. G. T. R. W. Co.* 6 Am. L. Reg., 680 was a suit between the owners of a vessel and an intermediate consignee to test the right to deduct the value of a "shortage" in the cargo, and the point under discussion was only incidentally alluded to, and the allusion was therefore a mere *obiter dictum*.

Dickerson vs. Seelye, 12 Barb., 99, was an action brought for freight by the plaintiff, who *himself* being the *owner* and *master*, had signed the bill of lading, and it was held that defendant, a purchaser in good faith of that bill, might on the trial, by way of diminishing the amount of plaintiff's recovery, show that the amount of coal called for in the bill had not been delivered.

Meyer vs. Peck, 28 N. Y., 590, was the suit of the assignee

of a claim for freight against the *shipper*, and the point now being considered was not in the case, but merely received a passing notice. It seems also that the *captain* of the canal boat was its *owner*; that the claim for freight was due *to him*, and that he was the assignor of that claim.

Howard, *et al.* vs. Tucker, *et al.*, 1 Barnw. and Adolph, 712, was only a contest between parties (one of whom was an assignee for value of a bill of lading, which recited that the freight had been paid,) respecting the right of defendants to retain money to reimburse themselves for money paid for that freight against the express directions of their principals, and when the bill of lading recited payment of the amount due for freight.

It will thus be seen from the above cited authorities, that the interrogatory propounded at the outset must meet with a reply in the negative.

It is a well settled maxim in Admiralty Jurisprudence, that "Freight is the mother of wages," and under the circumstances detailed in evidence here, so far as charging the owners of the boat is concerned, the actual delivery of the goods on board occupies towards the bill of lading for those goods the same maternal relation.

It would seem that there is an element of hardship in this case, but it is a hardship, which could readily have been avoided had those precautionary measures and inquiries, (which the law enjoins upon those about to purchase these *quasi* negotiable instruments or bills of exchange secured thereby,) been pursued.

For these reasons the action of the court below was undoubtedly correct, and its judgment will be affirmed.

Judge Wagner absent, the other Judges concur.

Huse, et al. v. McQuade.

WILLIAM L. HUSE, *et al.*, Respondents, *vs.* GEORGE MCQUADE, Appellant.

1. *Evidence—Contracts in writing—Parol testimony affecting.*—Parol testimony is inadmissible to vary the language of a written contract; no other words are to be added to it, or substituted in its stead.

* *Appeal from St. Louis Circuit Court.*

Stewart & Wieting, for Appellant, cited: *Weston vs. Emes*, 1 Taunton, 115; *Wright vs. Smith*, 16 Gray, 499.

H. Barry, for Respondents, cited: *McDonald vs. Longbottom*, 1 Ellis & Ellis, 977; 1 Greenleaf Ev., §§ 285, 297.

EWING, Judge, delivered the opinion of the court.

This was an action to recover a balance claimed to be due for ice sold and delivered by plaintiff to defendants. The answer admitted the delivery of the ice, and that the price had not been paid; and it is further alleged, that a contract in writing was entered into between the parties to the suit, by which the plaintiffs were to deliver to the defendant a certain quantity of ice during the year 1870 at a stipulated price, and that plaintiffs failed to perform the contract on their part, by reason of which the defendant was damaged \$1,000. Plaintiffs say in reply, that the contract referred to in the answer, although bearing date May 1, 1870, was actually entered into verbally on the 13th of April of that year, and before any ice was delivered, with the understanding that it was thereafter to be reduced to writing, and that defendant was to give security for performance on his part; that they commenced the delivery of the ice on the 14th of April, and continued to so deliver it until they had fully complied with the contract, except as to a small quantity about which there is controversy here.

The trial, which was by a jury, resulted in a verdict and judgment for the defendant for \$140. This judgment was reversed at General Term, and the defendant brings the cause to this court by appeal.

The only ruling of the court assigned for error is in refus-

ing the offer of plaintiff to show that the contract was made April 13th 1870, by parol, and that it was to be subsequently reduced to writing, and that ice was delivered until it was reduced to writing. The contract was read in evidence, and bears date May 21, 1870. It provides substantially, that the plaintiffs, in consideration of a certain price therein named, were to deliver to the defendant daily for his trade, as he required it, 200 tons of ice during the year 1870. This suit is for a balance claimed to be due for ice delivered in October and November.

The evidence offered did not tend to show a *different* contract from that read in evidence, nor to contradict it. Its effect was to show, that the agreement between the parties, of which the writing was the evidence, had been in fact made previously to the time the writing bears date. Its purpose was to prove the true date of the transaction, which according to an understanding then had, was to be reduced to writing afterwards, and that the plaintiff entered upon its performance immediately thereafter, and continued the delivery of ice under it, until it was fully complied with. The defendant alleged a breach of the contract in the failure of the plaintiffs to deliver the quantity of ice called for by it. The rejected evidence tended to rebut the testimony given in support of the averment, and to prove performance on the part of the plaintiffs. The admission of this testimony would not have contravened the rule which forbids the contradiction or the varying of the terms of written instruments by oral evidence. The rule is directed only against the admission of any other evidence *of the language* employed by the parties in making the contract, than that which is furnished by the writing itself—no *other words* are to be added to it, or substituted in its stead. (1 Greenleaf Ev., § 277.)

Judgment of the General Term, reversing the judgment at Special Term, is affirmed. The other Judges concur, except Judge Sherwood who is absent.

Ketchum v. The American Merchants Union Express Co.

EWING C. KETCHUM & Co., Respondent, *vs.* THE AMERICAN
MERCHANTS UNION EXPRESS COMPANY, Appellant.

1. *Common carriers—Liability—Special contract—Negligence.*—A common carrier by a special contract can limit his common law liability, but cannot exempt himself from the consequences of his own negligence.
2. *Common carriers—Breakage—Negligence—Prima facie case.*—Proof of breakage of goods in the hands of the common carrier makes a *prima facie* case of negligence against him, and the burden of proof is thrown on him to show due care and vigilance.

Appeal from St. Louis Circuit Court.

Daniel Dillon, for Appellant.

I. Under the special contract defendant was not a common carrier as to this glass, but a private carrier for hire and responsible according to the terms of his contract. (Angell on Carriers, 54; *Sunderland vs. Westcott*, 2 Sweeny, [N. Y.,] 260; *Dorr vs. N. J. Steam Nav. Co.*, 11 N. Y., 485; *Meyer vs. Harnden's Exp. Co.*, 24 How. Pr., 290; *Moore vs. Evans*, 14 Barb., 529; *French vs. Buff*, N. Y. & E. R. R., 4 Keyes, 119; *Nelson vs. H. R. R. R.*, 48 N. Y., 498; *N. J. Steam Nav. Co. vs. Mer. B'k.*, 6 How., [U. S.] 382; *York Co. vs. Central R. R.*, 3 Wall., 107; *Farnham vs. C. & A. R. R.*, 55 Pa. St., 53; *Colton vs. C. & P. R. R.*, 67 Pa. St., 211; *Squire vs. N. Y. C. R. R.*, 98 Mass., 236; *Groce vs. Adams*, 100 Mass., 505; *Lawrence vs. N. Y. P. & B. R. R.*, 36 Conn., 63; *Wallace vs. Matthews*, 39 Georgia, 617; *Balt. & O. R. R. vs. Rathbone*, 1 West V., 87; *The Penin & O. Steam N. Co. vs. Shand*, 3 Moore, Privy Council cases 272, New Series.)

II. A common carrier receiving goods under a special contract of this kind is liable for loss arising from his negligence only, and the burden of proof is on the owner to prove negligence. (Angell on Carriers, §§ 276, 473; *Story on Bailments*, 573; 2 *Greenleaf*, Ev. § 218; *Bankord vs. Balt. & O. R. R.*, 34 Maryland, 197; *Smith & M. vs. N. C. R. R.*, 64 North Car., 235; *Sager vs. P. S. & P. R. R.*, 31 Me., 228; *Adams Exp. Co. vs. Loeb & B.*, 7 Bush [Ky.] 499; *Moore vs. Evans*, 14 Barb., 524; *French vs. B. N. Y. & E. R. R.*, 4 Keyes, 119; *N. J. S. Nav. Co. vs. Mer. B'k.*, 6 How., U. S., 384; *Clarke*

Ketchum v. The American Merchants Union Express Co.

vs. Barnwell, 12 How., U. S., 280; Trans. Co. vs. Downer, 11 Wall., 129; Farnham vs. C. & A. R. R., 55 Pa. St., 53; Colton vs. C. & P. R. R., 67 Pa. St., 211; The Neptune, 6 Blatchf., 193; The Cleveland, 1 Newberry's Ad. R., 221; Ill. Cent. R. R. vs. Morrison, 19 Ill., 136; The Penin & O. S. N. Co. vs. Shand, 3 Moore. Privy Council, 272 New Series, 1865.)

William F. Causey, for Respondent.

I. A common carrier cannot exempt himself from losses caused by a neglect of that degree of care which the law casts upon him in his character of bailee. (*Levering et al. vs. Union Transportation Co.*, 42 Mo., 88; *Wolff vs. The American Express Co.*, 43 Mo., 421; *Steele & Burgess vs. Townsend*, 37 Ala. 247; *Hill vs. Sturgeon & Rawlings*, 28 Mo., 323; *Davidson vs. Graham*, 2 Ohio St. R., 131; *Graham & Co. vs. Davis & Co.*, 4 Ohio St. R., 362; *Michael vs. N. Y. Central R. R. Co.*, 30 New York, 564; *School District in Midfield vs. Boston, Hartford & Erie R. R. Co.*, 102 Mass., 552; *Penn. R. R. Co., vs. Butler*, 57 Penn., 335.)

II. The law raises an absolute and conclusive presumption of negligence, whenever the loss occurs from any other cause than the "Act of God or the Public Enemy." (*Wolf vs. The American Express Co.*, 43 Mo., 421. Also the Authorities above cited.)

III. The Burden of Proof is on the defendant to show that the goods were not damaged by reason of any want of care, skill and diligence on the part of the defendant or its employees. And further, where there is a special Contract limiting the carriers' responsibility, the *onus* of showing not only the cause of the loss was within the terms of the exception, but also that there was no negligence, rests upon defendant. (*Steele & Burgess vs. Townsend*, 37 Alabama, 247; 2 Greenleaf §§ 219, 222; (Before cited,) 42 Mo., 88; *Whiteside vs. Russell*, 8 Watts & Sergeant 44; *Parsons Contracts Vol. I*, Third Edition pp. 692-3-4-5; *Caldwell vs. The N. Jersey Steamboat Co.*, 47 N. Y. 282 *Burnell vs. N. Y. Central R. R. Co.* 45 N. Y. 185.)

Ewing, Judge, delivered the opinion of the court.

The petition alleged, that the defendant on the 7th day of June, 1870, was a common carrier, carrying goods, etc., from New York to St. Louis, and that on that day plaintiff delivered to defendant at the city of New York two boxes of plate glass to be safely and securely carried by defendant, as a common carrier, from New York to St. Louis, and there safely and securely delivered to plaintiff, for a reasonable reward, and that defendant not regarding its duty as a common carrier did not safely and securely carry the glass from New York to St. Louis, and did not safely and securely deliver it to plaintiff, but so negligently and carelessly acted in the premises, that by the negligence and carelessness and default of defendant the glass was broken to the damage of plaintiff, in \$1500.

The answer denied the material allegations of the petition, and set up a further defense, substantially as follows; that by the bill of lading given when the goods were delivered to defendant for carriage, it was agreed between plaintiff and defendant that the glass was to be carried at owner's risk, and also, that by special contract executed by plaintiff and defendant at the same time, plaintiff for the consideration of one dollar and the further consideration, that defendant would carry the glass at usual tariff rates and without extra charge, released defendant for all loss or damage to the glass, while being carried from New York to St. Louis, and while in defendant's possession or care, and agreed to indemnify defendant against any claim made by any consignee of the glass for damage to the same while being transported and in defendant's possession or charge.

The replication denied the new matter set up in the answer.

At the trial a jury was waived, and an agreed statement of facts filed, which stated that at the time the glass was delivered to defendant in New York, plaintiff and defendant by their respective agents entered into and executed a special contract in reference to the carrying of this glass, which contract was filed and made a part of the agreed-statement of facts; and at the same time defendant delivered the plaintiff the bill of lad-

ing filed and made a part of the agreed statement of facts; that the word "released" on said bill of lading means, that it was given and accepted by plaintiff subject to the terms of said contract; that the bulk of said boxes rendered it necessary, that they should be shipped in an open car, and they were transported in such cars; that the glass was transported from New York to East St. Louis by the usual and customary route, and and by the usual and customary means for transporting such freight, and was delivered to plaintiff at St. Louis on the 22nd day of June, 1870, and that plaintiff at the time the glass was delivered to him receipted for the same in good order as appeared by his receipts, which were filed and made a part of the agreed statement of facts, the legal effect of which was to be determined by the court; that defendant is usually engaged in the business of a common carrier and so is in this instance, unless stripped of that character by said contract and bill of lading. Then followed this clause in the agreed statement of facts; "In reference to all points not covered by the agreed statement of facts, either party is at liberty to introduce evidence at the hearing of this cause."

The special contract alluded to states in substance, that in consideration of one dollar and that defendant would carry the glass at the usual tariff rates and without extra charge, that plaintiff released the defendant for all loss or damage to the glass, while being carried from New York to St. Louis and while in defendant's possession, and plaintiff agreed to indemnify and save harmless the defendant from all claims made by any consignee of said glass for loss or damage to the same while in defendant's possession or charge; the bill of lading stated that all glass was carried at owner's risk; the receipts given by the plaintiff for glass, when he received it from defendant in St. Louis state that plaintiff received the glass from defendant in good order.

At the trial plaintiff offered evidence to prove that the glass was broken when received by plaintiff from defendant; defendant objected to this evidence, on the ground that the point in reference to the condition of the glass when delivered by defen-

Ketchum v. The American Merchants Union Express Co.

dant to plaintiff was covered by the agreed statement of facts, and consequently not open for further evidence; the court admitted the evidence, and defendant duly excepted; the evidence showed, that one box of glass was broken, when it was delivered to plaintiff; that there was an indentation in the box, such as would be caused by coming in contact with some sharp corner or object, and that the glass was shivered in all directions from that point.

Defendant then proved, that the glass was loaded on defendant's wagons at East St. Louis, and carried thence to plaintiff's store with the greatest care and diligence, and that plaintiff himself took charge of the unloading of it from defendant's wagons.

At the close of the evidence defendant asked an instruction, that upon the pleadings and evidence plaintiff could not recover, which instruction in the court gave, and plaintiff excepted.

The court at special term gave judgment in favor of defendant; from this judgment an appeal was taken to general term, where the judgment of special term was reversed, and the cause remanded, and from this judgment defendant appealed to this court.

1. It is insisted by the appellant, that any evidence as to condition of the glass, when delivered to plaintiff at St. Louis, was inadmissible under the agreed statement of facts. The agreement contained a stipulation which says: "In reference to all points not covered by the agreed statement of facts, either party is at liberty to introduce evidence at the hearing of the causes."

It was also agreed, that the legal effect of the receipts, among other papers, should be determined by the court. The receipts showing *prima facie* that the glass was in good order, when delivered to plaintiff, the agreement to submit the case for decision upon the facts would have been a vain and useless thing, unless evidence was admissible to show the *actual* condition of the goods. This was the "point" as to which, either party was at liberty to introduce evidence and which was *not* "cov-

Ketchum v. The American Merchants Union Express Co.

ered" by the agreed statement. As the plaintiff admitted that it was received in good order as appeared by the receipts, why have the courts to pass upon their legal effect, if no other testimony was admissible on this point?

2. It is urged that as the petition alleged a cause of action against the defendant as a common carrier on a general contract of affreightment, the evidence proved a special contract, which was at variance. The parties agreed to submit to the court the legal effect of this special contract with other exhibits. There is, it is true, no reference to this contract in the petition. The answer however traverses all the allegations of the petition, and sets out the contract; plaintiff replies denying that they entered into any such contract. After the issues were thus made up the parties agreed in effect, that the court might pass upon the contract the same as it might have done had the contract been referred to by plaintiff in his petition, (if indeed this was necessary) and read without objection at the trial. The agreement obviously means, that the court should determine the legal effect of the instrument for all the purposes of a trial of the case upon its merits. The question was, whether the special contract discharged the defendant as a common carrier from liability for loss or injury to the goods, or only limited or qualified it, and if so, to what extent.

(3. It is well settled, that a common carrier may limit his common law liability by a special contract with the shipper. And it is equally well settled, that such special contract cannot be pleaded by the carrier as an exemption from liability for any loss or damage resulting from his own negligence.) The only remaining question then is as to the burden of proof. The bill of lading in the case at bar contained a stipulation, that "glass (among other things therein mentioned) will be taken only at owner's risk." The special freight contract contained a stipulation to the effect that the defendant and the railroad connected therewith "are released from liability for breakage of all kinds of glass," &c.

Proof of injury to the goods by breakage nevertheless made out a *prima facie* case of negligence against the defendant,

State to use etc. v. Laies et al.

and the *onus* was on it to show the exercise of due care and vigilance on its part to prevent the injury.

The question was expressly decided in the cases of *Levering, et al.*, vs. The Union Transportation Co., 42 Mo., 88, and *Wolff vs. The American Express Co.*, 43 Mo., 421. See also, *Steele & Burgess vs. Townsend*, 37 Ala., 247; *Baker vs. Bronson*, 9 Richardson, L., 201; *Davidson vs. Graham*, 2 Ohio St., 131; *Graham & Co. vs. Davis & Co.*, 4 Ohio St., 363.

Judgment at general term affirmed. The other Judges (except Judge Wagner who is absent) concur.

—o—

STATE OF MISSOURI, to use of GREEN F. RUBY, Respondent,
vs. FELIX LAIES, *et al.*, Appellants.

1. *Estoppel—Declarations of owner.*—A. did blacksmithing for B. and procured a judgment against B. for the same, part of which was for shoeing a horse, which B.'s son brought to his shop to be shod, telling A. that the horse belonged to his father. The constable under this judgment levied on this horse. The son sued the constable on his bond for levying on the horse, claiming it as his own. *Held*, that the son was not estopped from denying his former assertion.

Appeal from St. Louis Circuit Court.

T. J. Cornelius, for Appellants.

Green F. Ruby having induced Mueller to part with his lien on the mare for work and materials furnished in shoeing her, by his own declarations that the mare was the property of Thomas P. Ruby, was estopped from setting up his claim to the mare as against said Mueller or the constable who levied on the mare under executions for such work and materials, in favor of said Mueller, and against said Thomas P. Ruby. (*Dezell vs. Odell*, 3 Hill, 219; *Newman vs. Hook*, 37 Mo., 207; *Rice vs. Bruce, Admr.*, 49 Mo., 312; *Taylor vs. Zepp*, 14 Mo., 482.)

Saml. N. Holliday, for Respondent.

This is not a case of estoppel. (*McDermott vs. Barnum*, 19 Mo., 204; *Newman vs. Hook*, 37 Mo., 207.)

ADAMS, Judge, delivered the opinion of the court.

This was an action on the official bond of the defendant Laies, as constable, for levying two executions in favor of Daniel Mueller, against Thomas P. Ruby on a bay mare belonging to Green F. Ruby, for whose use this suit was brought.

The only material issue presented by the pleadings was whether the mare in dispute belonged to Thomas P. Ruby or to Green F. Ruby. Upon the trial each party gave evidence conducing to prove the issues on his part. Among other evidence given by the defendants was a declaration made by Green F. Ruby to the effect that the mare belonged to Thomas P. Ruby.

Green F. Ruby was a son of Thomas P. Ruby, and lived with him in 1867, and prior to that time and subsequently. In 1867 the proof shows that the father, Thomas P. Ruby, gave this mare to his son. The evidence also shows, that Daniel Mueller, the plaintiff in the executions, was a blacksmith, and that he had worked for Thomas P. Ruby in shoeing his horses, &c., and kept an account against him for his work; that whilst this account was running, Green F. Ruby took this mare to Mueller to be shod, and after she was shod he told Mueller that the mare belonged to his father, Thomas P. Ruby, and to charge the shoeing to his account, which Mueller did, and this item formed one of the items in the account, constituting the judgment upon which one of the executions issued which was levied upon the mare. This is about the substance of the testimony.

After the close of the testimony the defendant asked this instruction, which was refused by the court.

"If the jury find that Green F. Ruby caused credit to be given to Thomas P. Ruby for work and materials furnished on the bay mare, by asserting said mare to be the property of said Thomas P. Ruby, then he is estopped as against said creditor, or the officer levying said execution in said creditor's favor, from setting up his title (if any), and the jury shall find for the defendants."

The refusal of this instruction is the main point relied on by the appellants for reversal of this judgment.

It is contended that the facts of this case create an estoppel and this instruction is based upon that idea.

But when we examine the proof, we find none of the essential elements of an estoppel. There was no credit given to Thomas P. Ruby on the mare in question. Nothing of the kind was asked by Mueller. Green F. Ruby simply told him that the mare belonged to Thomas P. Ruby, and to charge the shoeing to him, which he did. The declaration of Green F. Ruby turns out to be false, but what did Mueller lose or gain by the falsehood. If Green F. Ruby had told Mueller he might take a trust deed on the mare from Thomas P. Ruby, to secure his debt, and he had done so, this would have created an estoppel, and no proof to the contrary would have been allowed. Or if Green F. Ruby's right of recovery depended upon whether his father had been properly charged with the shoeing of the mare, he would be estopped from disputing it, because it had been made at his request, and this request had been acted on.

The declarations of Green F. Ruby to the effect, that the mare belonged to his father, was not so acted on as to create an estoppel, and to prevent him from proving his own ownership of the mare.

Mueller did not part with any lien or interest that he had in the mare, which he is prevented from asserting. He does not pretend to have any such lien, or interest growing out of the declaration in question.

There seems to be no light in which the facts of this case can be viewed so as to warrant the refused instruction.

The judgment in my opinion, is for the right party. Let it be affirmed. Judge Sherwood absent. The other Judges concur.

Porter v. Jones.

SAMUEL D. PORTER, Appellant, vs. ISAAC JONES, Respondent.

- 1 *Bills of exchange and promissory notes—Consideration—Appointment of an administrator—Public policy.*—A promissory note, whereof the consideration is an agreement to procure a responsible party and have him appointed administrator of an estate, is void as against public policy.

Appeal from St. Louis Circuit Court.

John W. Noble, for Appellant.

The question as to who is entitled to the opening and close of the case, is matter within the discretion of the court trying the cause. (*Leete vs. Ins. Co.*, 7th Eng. Law & Eq. R., 578. *Wade vs. Scott*, 7 Mo., 509; *Tibeau vs. Tibeau*, 22 Mo., 77; *Reichard vs. Manhattan*, 31 Mo., 520.)

The influence to be exercised, is to be upon the man not yet appointed to agree to *take*, and not upon the court to agree to appoint.

It was wholly in the power of the legatee, the respondent, to control the appointment as his interests alone were to be affected.

All the cases in reports and text notes differ so materially from this, that it would serve no good purpose to refer to them.

A recurrence to general principles on this head, will best show that the evils attempted to be suppressed by declaring contracts against public policy void, cannot be created by the agreement under consideration.

It will not be presumed that the contract was to do an unlawful act; the contrary is the proper inference. (*Lewis vs. Davison*, 4 Mees. & Wels., 654; *Brown's Legal Maxims*, (668,) 5.)

Leverett Bell, for Respondent.

Where a contract is entire, if a part of the consideration is illegal, the whole is void. (*Carleton vs. Whitcher*, 5 N. H., 196; *Valentine vs. Stewart*, 15 Cal., 387; *Collins vs. Merrell*, 2 Met. Ky., 163; *Pettit vs. Pettit*, 32 Ala., 288; *Rose vs. Truax*, 21 Barb. N. Y., 361; *Barton vs. Plank Road Co.*, 17

Barb. N. Y., 397; Filson's Trustees vs. Himes, 5 Baer. Penn. St., 456; Saratoga Bank vs. King, 44 N. Y., 87.)

The plaintiff's agreement to secure a responsible individual to take the position of administrator, necessarily involved an interference with the performance of the official duties thus imposed on the Judge or Clerk of the Probate Court, and was void as against public policy. (Filson's Trustees vs. Himes, 5 Barr. Penn. St., 452; Bowers v. Bowers, 26 Penn. St., 74; Eddy vs. Capron, 4 Rhode Island, 394; Tool Co. vs. Norris, 2 Wallace, (U. S.) 56.)

The law governing contracts void as against public policy, is illustrated and applied in the following cases: Grant vs. McLester, 8 Georgia, 553; Gray vs. Hook, 4 Comst., (N. Y.) 449; Gulick vs. Bailey, 5 Halsted, 87; Davison vs. Seymour, 1 Bosw., 88; Spinks vs. Davis, 32 Miss. (3 George,) 152; Firemen vs. Berghaus, 13 La. An., 209; Carlton vs. Whitcher, 5 N. H., 106; Lewis vs. Knox, 2 Bibb., 453; Mills vs. Mills, 40 N. Y., 543; Bowman vs. Coffroth, 59 Penn. St., 19; O'Hara vs. Carpenter, 23 Mich., 410. Ashby vs. Dillon, 19 Mo. 619.

ADAMS, Judge, delivered the opinion of the court.

This was an action on a promissory note for \$2,000 executed by the defendant to the plaintiff and dated 3rd March, 1870, and payable one year after the date thereof.

The defendant by an amended answer set up as a defense a total want of consideration, and that the only consideration for the note grew out of a written agreement executed by both parties, at the time the note was made, which reads as follows:

"This agreement entered into this 3rd day of March, 1870, by and between Samuel D. Porter of the City and County of St. Louis, State of Missouri, party of the first part, and Isaac Jones of the same City, County and State, party of the second part, witnesseth, That the said party of the first part, for and in consideration of the hereinafter agreement on the part of the party of the second, agrees to secure, in case of the resig-

nation or failure on the part of Rudolph Bircher to act as the administrator of the estate of Amaziah Jones deceased, which position he now holds, a responsible individual to take such position; in case of the failure of said Bircher to resign or decline to act, then to assume or cause to be assumed all liabilities, liens or indebtedness of said estate and hold the same subject to adjustment or liquidation from the proceeds of said estate; said party of the second part, in consideration of the above undertaking on the part of the said party of the first part, agrees to pay the said party of the first part the sum of two thousand dollars out of the proceeds of said estate, and hereby authorizes the administrator appointed to pay said sum of two thousand dollars to the said Samuel D. Porter party of the first part out of the proceeds of said estate received from rents or sale of the same or any part thereof after payment of all prior liens; this agreement to be full authority to the administrator so to do; in case said Porter fail to secure such administrator or to cause to be assumed the liability hereinbefore specified and to be paid out of the administration proceeds of said estate, then the agreement on part of party of second part to be null and void, to secure which sum of two thousand dollars the party of the second part has subscribed a note for said sum of even date herewith.

(Signed,)

JOHN B. HIGDEN,
LEON L. HULL,

S. D. PORTER,
IKE JONES."

The answer further alleges, that the said Bircher resigned his letters of administration on the 7th of March, 1870. but that the defendant wholly failed to comply with his agreement to secure a responsible party to administer on the estate, and the answer further relies upon the defense, that the alleged agreement was against public policy, and that it formed the only consideration for the note and that the note is therefore void.

The replication admits the agreement as set out, but charges that the plaintiff fully complied with its terms, denies that it was against public policy, &c.

Upon the trial the plaintiff was permitted to open and close the case before the jury and this is assigned for error here.

Evidence was given tending to show that the plaintiff had fulfilled his part of the alleged agreement, and on the part of the defendant proof was given tending to show that the plaintiff had not performed his agreement.

At the close of the case the defendant asked an instruction to the effect, that the plaintiff was not entitled to recover on the case as made before the jury. The Court refused this instruction and the defendant excepted. Other instructions were given and refused, but under the view I take of the case it is not material to notice them. The jury found a verdict for the plaintiff for the amount of the note and interest, and a judgment was rendered thereon at Special Term, which was reversed at General Term; and from this reversal the plaintiff has appealed to this Court.

The evidence on the trial showed that defendant was residuary legatee of the estate of Amaziah Jones, deceased. In case of the resignation of Bircher as administrator, he would have had the right to administer, and if no person entitled to administer should apply it would be the duty of the Probate Court if in session or the Clerk in vacation to appoint a suitable person. (1 W. S., 72, §§ 6, 7.)

Parties have no right by agreement to attempt to control the discretion of the Probate Court, or the Clerk in the exercise of this discretion. The law is that the Court or Clerk in the contingency named, shall grant letters to any person who "shall be considered most suitable."

It is contended here, that all the plaintiff undertook to do was to find a responsible person who would take the appointment. That does not seem to be the scope and meaning of this contract. Was it the intention of these parties, that the plaintiff was to be paid two thousand dollars, whether the person he suggested was appointed or not? That would be the result if he was simply to procure a person who would take upon himself the administration if tendered to him.

In my judgment this agreement means, that the plaintiff was to secure the appointment of a responsible individual as administrator of this estate, he was not merely to find the

person, but to secure his appointment by the Probate Court or the Clerk in vacation.

This is demonstrated by the language used in the latter part of the agreement. The language referred to is "in case said Porter fail to secure such administrator or cause to be assumed the liabilities, &c., &c., then the liability on part of party of second part to be null and void." The main purpose of the agreement was to secure the appointment of an administrator. This agreement amounts to a trafficking in this important trust. Although it is not a public office, it is nevertheless a private trust just as sacred, and arises from an appointment to be made by a public court or officer. An agreement to procure an appointment to office is against public policy and void. The trust devolved upon an administrator through the appointment of a public functionary, ought to have the same safeguards thrown around it as if were a public office.

The note sued on in this case and the agreement upon which it was based, must be taken together and viewed as one instrument. As they amounted to a trading in the appointment of an administrator they are void as against public policy. This seems to be well settled by the authorities. (See *Bowers vs. Bowers*, 26 Penn. St., 74; *Davison vs. Seymour*, 1 Bosw., (N. Y., 88) *Eddy vs. Capron*, 4 Rhode Island, 394; *Firemen vs. Berghaus*, 13 La. An., 209; *Gray vs. Hook*, 4 Comst., (N. Y.) 449; *Kick vs. Merry*, 23 Mo. 72; *Kribben vs. Haycraft* 26 Mo., 396; *Common Contracts*, 30.)

Clark vs. Constantine, 3 Bush. (Ky.) 652, which seems to intimate a contrary rule in a case somewhat similar to the one under review, does not seem to have been well considered, and is opposed to the principles decided in the very authorities referred by the Judge who delivered the opinion.

The question as to which party ought to have been allowed to open and conclude before the jury, becomes unimportant, as the doctrines here laid down must dispose of the case. But it may be observed, that the party on whom the burthen of proof lies in the first instance, ought to be allowed to open and conclude before the jury.

 Barr, et al. v. Cabbage, et al.

The judgment at General Term is affirmed and the petition dismissed. Judge Sherwood absent. The other Judges concur.

—O—

WM. BARR, *et al.*, Appellants, *vs.* ELIZA R. CUBBAGE, *et al.*
Respondents.

1. *Equity—Trust funds, diversion of—Cestuis que trust—Third parties.*—Third parties cannot for their own protection require the *cestuis que trust* to pursue the proceeds of trust funds in other investments; the *cestuis que trust* have their option to do so, or to hold the trustees liable.
2. *Administration—Executor de son tort—Contracts, enforcement of—Third parties.*—Third parties cannot call upon an administrator to carry out contracts, which they have made with an administrator *de son tort* of the same estate.

Appeal from St. Louis Circuit Court.

Hendershott & Chandler, for Appellants.

The plaintiffs standing in the shoes of the residuary legatee as to the partnership estate, are entitled to enforce due performance of all trusts under the will, necessary for the preservation of their legacy. (Story's Eq. Jur. (Redf. Ed.) § 424 citing numerous cases.)

"Courts of Equity have an original, inherent and independent jurisdiction *to relieve against every species of fraud*, not being fraud of a penal nature." (Kerr on Fraud and Mistake, 43.)

The plaintiffs having been deceived and defrauded by the wife, are in equity entitled to have the legal powers of the administrator so employed, as to restore them as nearly as possible to the same position they occupied before the fraud was practiced upon them. (Kerr on F. & M., 47-8.)

Dryden & Dryden and M. Kinealy, for Respondents.

Where by statute the executor is required to file a bond in order to qualify, if the person named as executor fails to give

bond he will have no rights whatever as such. (Carter's Exrs. vs. Carter, 10 B. Monroe, 327; Mitchell vs. Rice, 6 J. J. Marshall, 627; Robertson vs. Gaines, 2 Humphreys, 381; Ul-drick vs. Simpson, 1 S. C., 283; Munroe vs. James, IV. Muhn-ferd, 201; Perry on Trusts, 244.)

The plaintiff cannot compel either the minors or the ad-ministrator to resort to a suit against Mrs. Cabbage, or to the property in her possession. If Mrs. Cabbage has any prop-erty, let them resort to their plain legal remedy and recover back their ten thousand dollars.

Mrs. Cabbage cannot be deemed to have received the money as a trustee, for the purpose of making the investment direct-ed by the sixth clause of the will, because that was an invest-ment to be made by the *executors as such*. (Hall vs. Mackay, 9 Pick., 395; Perkins vs. Moore, 16 Ala., 9.)

VORIES, Judge, delivered the opinion of the court.

The plaintiffs in their petition charge the following facts as ground of relief in equity:

That on the 19th day of March, 1866, plaintiffs and said Ed-ward J. Cabbage, deceased, entered into a co-partnership as dry goods merchants, to commence on the 1st day of January, 1866, to continue for two years; that amongst other things it was provided by their articles or agreement of partnership, that in case of the death of one or more of the partners be-fore the expiration of the term of said partnership, that said partnership should not thereby be dissolved, but should con-tinue and be carried on by the surviving partners during the said term, and that in such case the representatives in interest of such deceased partner, should not have or possess any pow-er or authority over or interfere with the business, but the successors should be entitled to receive from the firm at the rate of not exceeding eight thousand dollars per annum.

That after said partnership business had been carried on for some time, to-wit: On the 3rd day of April, 1866, the said Edward J. Cabbage died; that before his death he made his last will and testament, by which he disposed of his prop-erty and estate as follows:

Barr, et al., v. Cabbage, et al.

"First. I do hereby order and direct my executors hereinafter named and appointed, to pay all my just debts and funeral expenses, so soon as the same can be conveniently done after my death."

"Second. I give unto my wife Eliza R. during her lifetime, the sole and exclusive use, benefit and behoof of all and singular, the real estate, of which I shall die the owner, wheresoever the same may be situated."

"Third. I give, devise and bequeath unto my said wife Eliza R., absolutely for her sole, exclusive use, benefit, and advantage, all and singular, my personal estate, of whatever kind and nature the same may be, or wheresoever the same may be situated, except as hereinafter mentioned and directed."

"Fourth. Upon the death of my said wife Eliza R., and as soon thereafter as the same can be conveniently done, it is my will, and I do hereby order and direct the surviving executor of this, my last will and testament, to sell and dispose of all the real estate of which I shall die the owner, wheresoever the same may be situated, to the best advantage for cash, and the proceeds arising from such sale or sales of my said real estate, after deducting therefrom all just and proper costs and expenses, it is my will, and I do hereby order and direct my said executor immediately thereafter to pay my two children, Catherine and James R., the same, to be divided between them, share and share alike."

"Fifth. It is my will, and I do hereby order and direct my executors, in last clause named, upon the sale and sales (if any) of my real estate being completed, to make, execute and deliver, or cause to be made, executed and delivered, good and sufficient conveyance and conveyances (if required) in the law to the purchaser or purchasers, at said sale or sales."

"Sixth. It is my will, and I do hereby order and direct my executors hereinafter named, immediately after my death to safely and securely invest the sum of ten thousand dollars to and for the following uses and purposes exclusively: They shall appropriate and expend the entire income arising there-

from for the purpose of educating, clothing and maintaining my said two children, Catherine and James R., until they shall have respectively arrived at the age of twenty-one years, and when they shall have respectively arrived at the age of twenty-one years, then it is my will, and I do hereby order and direct my said executors to pay to each of them, upon his or her arrival at said age, the sum of five thousand dollars, being a part or portion of said sum of ten thousand dollars, hereinbefore ordered to be safely and securely invested."

"*Seventh.* I do hereby nominate and appoint my wife Eliza R., executrix, and my friend James Meeghan, executor of this, my last will and testament."

That the said will was probated, but that neither the executor or executrix therein named, ever gave bond or qualified as such. That the said Eliza R., contriving and fraudulently intending to defraud the plaintiffs, assumed to act as such executrix, took upon herself the administration of said estate under the will, taking possession of the assets and paying the debts and liabilities of the same, and falsely represented to plaintiffs, that she had duly qualified under said will, and that she was as executrix entitled to receive and receipt for the interest of deceased in said firm, and that the plaintiffs believing said false representations, from time to time between the 3rd day of April 1866, and December, 1867, paid her sums of money on account of the interest of said deceased in said partnership, amounting in the aggregate to more than thirty-six thousand dollars.

That plaintiffs continued to carry on the business of said firm during the term of said partnership. That during the month of December, 1867, the plaintiffs accounted with said Eliza R. for the interest of deceased in said firm, and purchased of her said interest remaining after the payment of the sum before stated, and the said agreement of purchase was in writing, by which she attempted to convey to plaintiffs all of the right, title and interest, which the said Edward J. Cabbage at the time of his death had in said firm, and all the interest which she had or was entitled to by virtue of said will, in and

to the property or effects of said firm of every description whatever; that plaintiffs paid said Eliza, forty thousand dollars for said interest in said firm, and bound themselves to, and did pay all of the debts and liabilities of said firm; that plaintiffs never had learned until long after they had purchased the interests of said deceased, and of said Eliza in said firm, and paid therefor, that said Eliza R. had not duly qualified as executrix under the will of said deceased, she having fraudulently concealed that fact from plaintiffs, and having taken possession of all the property of said estate, and paid all of the individual debts of said estate, and she having assumed to act and really acted in all respects, as if she had so qualified, and was the legal acting executrix of said estate.

That the said Edward J. Cabbage at the time of his death, was the owner in fee of the following real estate in the County of St. Louis, and State of Missouri, viz.: Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12, in Block (D) of the town of Kirkwood, having an aggregate front of six hundred feet on the north line of Madison Avenue, and running back to an alley dividing said block (D) from the Pacific railroad depot grounds. He was also the owner of a leasehold interest in a house and lot of ground on or near Sixteenth street in the City of St. Louis, which plaintiffs are informed and believe that said Eliza R. has caused to be renewed to herself since his death, by virtue of some provision in said lease. The property of which said deceased died the owner, other than his interest in said firm and said real estate, was inconsiderable, consisting of household furniture, horses and carriages, &c., much of which remains in possession of said defendant, Eliza.

That since the death of said Edward, the said Eliza has, with the money paid her by the plaintiffs, erected large and valuable improvements upon said twelve lots in the town of Kirkwood, including a building erected on said lots nine, ten, eleven and twelve, known as the Kirkwood Hotel, and has purchased and erected valuable improvements on blocks nine and ten in H. W. Leffingwell's first addition to said town of Kirkwood. Plaintiffs charge that said defendant Eliza, is yet the

owner of said block nine, and the western portion of said block ten, which is described in the petition, and upon which it is charged that said defendant has erected two valuable buildings. Plaintiffs charge that by the assumption of the administration of said estate by the said Eliza, and the taking possession of the assets by her, and particularly the money paid her by plaintiffs, she assumed and undertook the execution of, and bound herself to duly execute the trust created by the 6th clause of said will, and that having failed to execute the same in another mode, she by the making of said purchases and improvements, and especially the improvements on said twelve lots of which the said Edward J. Cabbage died seized, thereby made such an investment as was contemplated and provided for by the 6th clause in said will, and that the said purchases and improvements became and are trust property, and an investment for the benefit of said Catharine and James R. Cabbage, subject to the provisions of said 6th clause in said will, and she the said Eliza became and is a trustee in respect thereto, and in equity bound to make due conveyance thereof, or make such other disposition of the same, as may be necessary and effectual to secure said property for the purposes of said investment; all of which she has failed to do, but on the contrary, has held and yet holds said property undistinguished from her own, and without having executed any formal declaration of trust or otherwise setting apart said property for the purposes of said trust. That in March, 1871, the said Eliza, to further prosecute her purpose to cheat plaintiffs, induced the defendant Mitchell, to administer upon the estate of said Edward J. Cabbage deceased, and that said Mitchell with like designs and with full knowledge of the facts aforesaid, did sue out administration upon said estate, and letters of administration with the will annexed were granted to him thereon on the 22nd day of March, 1871, and on the first day of May, 1871 he took out administration on said partnership effects, and he has demanded of the plaintiffs, that they deliver to him any and all assets of said partnership in their possession, and that they pay to him the said sum of ten thousand dollars

named in said sixth clause of said will with interest thereon, and threatens to institute legal proceedings against plaintiffs to enforce his demands. That the defendants all reside in St. Louis County, where Edward Cabbage died, and the said defendants Catherine and James Cabbage are minors of eleven and fourteen years of age.

That the improvements and purchases made by defendant Eliza, are sufficient to secure the sum named in said sixth clause of said will, if the same be properly preserved for the benefit of said minor defendants, but that the said Eliza is incompetent to manage the same, that she has squandered the money paid her by plaintiffs, other than the amounts expended in the purchases and improvements aforesaid. That there are incumbrances on much if not all of said real estate, the amount whereof is not known to plaintiffs, though they are informed and charge that there is an incumbrance of more than eight thousand dollars on said block nine, and the western part of block ten, that she has neglected to keep down the taxes and interest thereon, and also to keep the buildings insured, and that there is great danger, that before the termination of this suit, the buildings may be destroyed and the property sacrificed, unless a receiver be appointed to take charge of the same, &c.

That said defendant Eliza is insolvent, that the only property owned or possessed by her is the property aforesaid, that notwithstanding the great value of the improvements placed by her on the 12 lots in Block (D) and in said blocks nine and ten in Kirkwood, and the entire sufficiency of the same as an investment to satisfy the terms of said sixth clause of said will in favor of said minor defendants, yet her interest in said twelve lots being but a life estate, and said blocks nine and ten being heavily incumbered, the whole would sell for but a small sum, and would be wholly inadequate to raise by a sale thereof, the said sum of ten thousand dollars, and if the plaintiffs should be compelled to pay to said administrator the said sum and interest, they would be entirely remediless in the premises.

The plaintiffs then pray that an account be taken of the

amount and value of said purchases and improvements made by defendant Eliza, and also of the incumbrances thereon, and also of the personal property that came into her hands, and is yet in her possession, belonging to said estate, other than the sums paid her by plaintiffs, and that the interest of said Eliza in said property, real and personal, with the improvements made by her thereon, may be declared to be a trust estate for the benefit of said minor defendants, and that said Eliza be decreed to make conveyance thereof to said administrator, or to some other person, in trust for said minor defendants, as an investment under said sixth clause of said will, that if said real estate be insufficient for said purpose she be required to deliver to said administrator the personal effects in her hands, the proceeds thereof to be applied in aid of said lands for the purposes aforesaid, that a receiver be appointed to collect rents and pay taxes, &c., and that the administrator be compelled to convey plaintiffs the interest of deceased in the partnership effects aforesaid, and that plaintiffs may have such other relief &c.

- To this petition the defendant, Mitchell, the administrator, demurred on the ground that the petition did not state facts sufficient to constitute a cause of action against said defendant that said petition is multifarious, that defendant is not a necessary party to a complete determination of the action, and that the plaintiffs are not entitled to any relief as against said defendant, from the facts shown in the petition.

A guardian *ad litem* was appointed for the infant defendants, who demurred to the petition on the part of said defendants setting out as grounds of demurrer :

1st. The petition fails to state facts showing any interest of said defendants in the subject matter of suit, and it is not shown why they were made parties defendant; that matters of a legal and of an equitable nature are set forth in the same count. The petition sets forth two causes of action in the same count against different persons having different interests and requiring different kinds of relief. The plaintiffs have a complete remedy at law on the only cause of action set forth in their petition.

The defendant Eliza R. also demurs on the ground, that the petition is multifarious, and that the plaintiff's remedy, if any, against said defendant, is at law and not by petition in equity.

These demurrers were sustained in the special term of the St. Louis Circuit Court, and final judgment rendered against the plaintiffs; from this judgment they appealed to the General term, where the judgment of the special term was affirmed, and from this last judgment plaintiffs appealed to this court.

The appellants insist that they are entitled to the relief prayed for in the bill, and that the facts stated in the bill or petition are sufficient to authorize the decree prayed for; that whether the contract made by them with defendant Eliza R. Cabbage, was sufficient to convey the interest of Edward Cabbage deceased, in the partnership effects to them or not, it had the effect to transfer to them her right in the estate of her husband as residuary legatee, and that by virtue of this interest in plaintiffs, they had a right to call on a court of equity to compel the administrator to so administer the effects of said estate, as to protect the rights of plaintiffs as residuary legatees or as representing the interest of the residuary legatee. This proposition may to some extent be true when a proper state of facts are shown by the petition; but does the petition in this case show the proper state of facts, or is the case as made in the petition, one that will authorize the relief prayed for, or any relief as against the defendants in this case?

The main object of the petition in this case, or one of its main objects, seems to be to compel the two infant defendants to treat the defendant Eliza R. Cabbage, as an executor of her own wrong, and charge her as a trustee for them in the wrongful receipt of the money paid her by the plaintiffs; and then to compel them to follow this trust fund into the property purchased and the improvements made by her with the same, and thus exonerate the partnership effects from the payment to the administrator of the ten thousand dollars to be invested for the benefit of these defendants, under the sixth clause of the will.

It may be, that if it were necessary to do so, a court of equity would interfere on the part of these minor legatees and charge the property purchased and the improvements made with the money received by Eliza R. Cabbage from plaintiffs, with the legacy bequeathed to these defendants, but the minor defendants cannot be compelled to accept this remedy. The plaintiffs have no equity as against them. If Eliza R. Cabbage defrauded the plaintiffs by representing herself to be the legally authorized executrix of said estate, the rights of these minor defendants cannot be affected thereby, nor can the rights of the rightful administrator with the will annexed to recover the money for the benefit of said defendants under the sixth clause of the will, be affected thereby. It is the duty of the executor under the will, and of the administrator with the will annexed, and they are directed by the will to "securely invest the sum of ten thousand dollars to and for the following uses and purposes exclusively: They shall appropriate and expend the entire income arising therefrom, for the purposes of educating, supporting, clothing and maintaining my said two children Catharine and James R., until they shall respectively have arrived at the age of twenty-one years, and when they shall have respectively arrived at the age of twenty-one years, then it is my will and I do hereby order and direct my said executors to pay to each of them five thousand dollars." Whatever right the plaintiffs may have against defendant Eliza, R. growing out of her fraud, these children have done nothing that will give the plaintiffs any equitable right as against them, to compel them to follow the money wrongfully paid to said Eliza R. into uncertain investments in improvements and property, in which she has a life estate, and which improvements may be valueless by the time they arrive at twenty-one years of age, at which time they are entitled to receive, and it is the duty of the administrator to pay them each the sum of five thousand dollars.

Courts of equity it is admitted have jurisdiction over the administration of assets in the hands of the executor, so as to prevent waste of the same and thereby protect the residuary

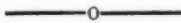
legatees. (Story's Equity Jur., §§ 532 to 534-591-593.) But this suit is not brought for any such purpose. It may be that upon a proper bill being filed by the plaintiffs to have themselves substituted to the rights of Eliza R. Cabbage as residuary legatee, and compel the administrator to apply the assets in his hands or in his power to raise the money for the minor defendants, so as to preserve the residue for the benefit of plaintiffs as such residuary legatees, that a court of equity would grant relief; but in such case it would have to be shown that there were assets which were not being properly administered by the executor, and that plaintiffs would be injured thereby, and then no relief would be given in favor of plaintiffs, which would be detrimental to the rights of the minor children.

It is insisted on the part of the plaintiffs, that the Court ought to have taken jurisdiction of the cause and granted the relief prayed for on the ground of fraud. This might also be tenable in a proper case as against the party guilty of the fraud, but there is no fraud charged against the minor defendants in this case, nor is it charged that they have ever assented to or received any benefit from the fraud of their mother, or from the mistake or carelessness of plaintiffs in paying their money to one not entitled to it, nor is it charged that Mitchell the administrator, had anything to do with the fraud of said Eliza in obtaining the money from plaintiffs. What is charged against the administrator, is that he is demanding of them what under the law he has a right to demand. But it is charged that he has a fraudulent design in making said demand. If the act of the administrator is legal in itself, it makes no difference about the motive with which it is done. If it violates no right a court will not interfere to prevent the act. (*Adler et al. vs. Fenton, et al.*, 24 Howard, U. S. 407; *State, &c. vs. The Boatmen's Savings, &c.*, 48 Mo., 189.)

It is further contended by the plaintiffs that their bill should have been sustained on the ground that it prayed for a specific performance of the contract between them and Eliza R. Cabbage, and that they have no adequate remedy at law.

To this it may be answered that the main object of the bill seems to be to compel the minor defendants to follow the money paid by them to said defendant Eliza into the land and improvements made and purchased by her with said money, and have the same declared trust property for their use in exoneration of the partnership effects. At least this part of the bill is all that said minor defendants have any interest in. If the jurisdiction is to be entertained for the purpose of a specific performance of the contract with said Eliza, the minor defendants have no interest in that, so far as her residuary interests are concerned, and the bill as to them would be multifarious. And as far as the bill seeks to specifically perform the illegal contract to convey the interest of deceased in the partnership effects, I know of no rule of equity by which an illegal contract can or will be specifically performed. Taking any view of the case, I cannot see, that there is any equity shown in the bill as against either the administrator or the minor defendants.

The other Judges concurring the judgment of the St. Louis Circuit Court will be affirmed.



THE CITY OF ST. LOUIS, Respondent, vs. JOHN F. HEGER, Appellant.

1. Appeal dismissed for want of assignment of errors.

Appeal from St. Louis Criminal Court.

E. P. McCarty, for Respondent.

VORIES, Judge, delivered the opinion of the court.

The appellant in this case having failed to file any assignment of errors or statement or brief in the case as required by the statute of the State and rules of this court, or to otherwise prosecute his appeal, the same is dismissed.

STATE OF MISSOURI, Plaintiff in Error, vs. JOHN G. FOSS, Defendant in Error.

1. *Practice, criminal—Costs—Dismissal at costs of defendant—Fee of Circuit Attorney.*—When a proceeding on indictment is dismissed by agreement at defendant's costs, the fee to which the circuit attorney is by law entitled in case of conviction is not taxable as part of the costs. His right to his fee depends upon conviction.

Error to Hannibal Court of Common Pleas.

O. Carstarphen, William P. Harrison and M. L. Hollister, for Plaintiff in Error.

D. H. & G. F. Hatch, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted in the Hannibal Court of Common Pleas for selling liquor without license. The parties, both plaintiff and defendant, appeared in open court, when the Circuit Attorney with the approbation of the court made an agreement with the defendant that the case should be dismissed at the defendant's costs. Judgment was therefore given in accordance with the agreement and the costs were taxed by the clerk, including the sum of five dollars as a fee for the Circuit Attorney, and execution was issued therefor. The execution was satisfied by the defendant, and at the return term he appeared and filed his motion to re-tax the costs in the cause, and alleged as a reason therefor, that the clerk had erroneously and illegally taxed against him the sum of five dollars as a fee to the Circuit Attorney. The motion was sustained by the court, and on a re-taxation the five dollars allowed the Circuit Attorney was stricken out.

The only question in the case is, whether the Circuit Attorney was entitled to a fee. The section of the statute which controls and determines this case, (1 Wag. St., p. 619, § 2) declares that for conviction upon indictment, when the punishment assessed by the court or jury shall be a fine or imprisonment in the county jail, or both such fine and imprisonment, the Circuit Attorney shall be allowed a fee of five dollars.

The reading of the statute is plain and divested entirely of

ambiguity. A pre-requisite to receiving the fee, is a conviction upon the indictment and an assessment by the court of a punishment, either by fine or imprisonment, or both. Was there any conviction or punishment assessed in this case? There was no arraignment or plea, of either guilty or not guilty. There was no determination of guilt or innocence by the court, and no judgment or assessment of a fine or imprisonment. The judgment was founded upon an agreement, by which a conviction, fine and imprisonment were waived if the defendant would simply pay the costs. It is true, costs naturally follow and are incident to a judgment of conviction, but here we see there was no conviction within the meaning of the law. The criminal statutes fully designate what is intended by a conviction. It is clearly where, by a trial or confession the defendant is assessed to pay a fine or be imprisoned, or is punished by both these modes. But there is no conviction for costs only, to entitle the Circuit Attorney to his fee. A case similar to this was recently passed upon at the February Term, and decided in accordance with these views. (See State, *ex rel.*, Wood vs. Ray County Court, *ante* p. 27.)

The reasoning in the case of the State *ex rel.*, Hopkins vs. Buchanan County Court, (41 Mo., 254) is not very satisfactory as regards a judgment of dismissal with costs by agreement, being equivalent to a conviction.

For the purposes of that case it may be conceded to be correct, as the agreement of the defendant fixed his liability for the costs, but for the costs only that were taxed and authorized by law. But in the present case, the fee of five dollars to the Circuit Attorney was not authorized, as that officer had not prosecuted the indictment to a conviction, which was essentially necessary before an allowance could be made to him.

The case of the State vs. Beard, (31 Mo., 34) decides the very point here presented for review, and holds that where the prosecution of an indictment is dismissed at defendant's costs, a fee for the Circuit Attorney cannot be properly taxed against the defendant.

Wherefore it results that the court did not err in striking

out the fee taxed in favor of the Circuit Attorney, and its judgment must be affirmed. All the Judges concurring.

—O—

STATE OF MISSOURI Defendant in Error, *vs.* JOHN R. KNOX,
Plaintiff in Error.

1. *Money brokers—Licenses—Counties—State.*—Under the Statutes W. S., 247 § 1; *Id.*, 1196, § 76,) the county courts are empowered to levy taxes and exact licenses from money brokers, for State and county purposes.

Error to Lincoln Circuit Court.

C. E. Peers, for Respondent.

EWING, Judge, delivered the opinion of the court.

Defendant was indicted at the March Term, 1871, of the Lincoln Circuit Court, for carrying on the business of a money broker without a license.

The cause was submitted to the court upon the following agreed statement of facts, namely: That in March 1871, defendant was engaged in the business of money broker or exchange dealer, in the County of Lincoln; that about that time, the collector of Lincoln County demanded of him one hundred dollars for State and County licenses, fifty dollars of which was for the State and the remainder for the County, that the defendant tendered to the said collector the sum of fifty dollars for the State, which the collector refused to accept, but refused to pay the other amount claimed to be due the county, on the ground that the sheriff had no right to demand and the county no right to levy this tax in addition to the tax levied upon the capital, for county purposes. It was further agreed, that the only action taken by the County Court of Lincoln County in reference to the tax on money brokers and exchange dealers is an order of said court, dated December 21st, 1870, which is as follows: The court grant a license to John R. Knox to keep a money broker or exchange dealers office in Troy for six months, ending February 28th,

Bowles v. Lewis.

1871, by paying the County Collector the sum of fifty dollars for the State and fifty dollars for the County; that said order was made without the knowledge and not at the instance of the said Knox. It is further admitted, that the defendant pursued the business of money broker or exchange dealer without either State or County license. Upon these facts the court found the defendant guilty in manner and form as charged in the indictment, and assessed the fine at one thousand dollars. A motion for a new trial was overruled, and the cause is brought here by writ of error.

"No person or association of persons shall carry on the business of dealing in, or buying or selling, &c., any kind of bills of exchange, checks, draft bank notes, &c., without a license for that purpose continuing in force." (1 Wag. Stat., 247, § 1, of chapter concerning Brokers.) "County Courts are empowered to levy such sums as may be annually necessary to defray the expenses of their respective counties, by a tax upon all property and licenses made taxable by law for State purposes." (2 Wag. Stat., 1196, § 76.)

Upon the facts admitted, defendant was clearly liable, and the fine was properly imposed. Judgment affirmed. The other Judges concur.

—o—

DAVID BOWLES, Defendant in Error, vs. ENOS LEWIS, Plaintiff
in Error.

1. Writ dismissed for want of assignment of error.

Error to the St. Charles Circuit Court.

A. H. Buckner, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

In this case there has been filed neither assignment of errors, statement nor brief, by the party who seeks a reversal of the judgment of the court below.

Let the writ of error be dismissed. The other Judges concur.

STATE OF MISSOURI, *ex rel.* JOHN GRETHER, Appellant, *vs.* CONSTANTINE MAGUIRE, COLLECTOR, &C., Respondent.

1. *Revenue—License—Omission to levy tax—May be supplied afterwards.*—The omission by the County Court to levy a tax upon licenses, in making a general levy, does not extinguish their authority, and they can cure the omission and make a levy subsequently.
2. *Revenue—License—Tax upon, when collected—Incumbrance.*—When a tax is levied on a license it becomes an incumbrance upon it, and the proper time to make the collection, is at or before the delivery of the license.

Appeal from St. Louis Circuit Court.

Hitchcock, Lubke & Player, for Appellant.

I. No county tax had been imposed on licenses at the time when relator demanded his, and offered to perform all the conditions which the law at that time prescribed for obtaining the same; his right accrued on the day of his demand, and could not be affected by any subsequent order of the County Court imposing new conditions. The relator having tendered and offered to comply with all the conditions prescribed by §§ 8, 9 and 11 on p. 207, 1 W. S., Ed. of 1870, the respondent was bound to grant him a license. (W. S., 207, § 7.)

II. The order made by the St. Louis County Court, April 20, 1871, the day after relator demanded his license, imposing a county tax on auctioneers' licenses was illegal and void.

In July 1870, the County Court fixed the rate of taxation for the ensuing fiscal year, ending August 31st, 1871, and including April 1871, and no tax was then imposed on auctioneers' licenses.

(a.) The county expenses during the ensuing year were then estimated, also the value of the property to be taxed, and the rate of taxation was fixed sufficiently high to meet the needs of the county; this having been done, their power of taxation for that fiscal year was exhausted. (2 W. S., Ed. of 1870, p. 1196, §§ 7, 6, *et seq.*)

(b.) The power given to impose a tax must be construed strictly, hence the inquiry was not proper here, whether this is a statute in its nature mandatory or directory.

(c.) *Time* is an important element in considering when the

power can be exercised. The time of the execution of the power here invoked, was when the first order was made, *i. e.*, when the court had the finances of the county before it, and could and did determine what was "necessary to defray the expenses" of that fiscal year.

(*d.*) If the second order is allowed to stand, then County Courts are at liberty to produce an *inequality* in taxation, by making one assessment and then making up deficiencies without regard to equality, and of subjects not taxed.

(*e.*) Upon the face of it the second order fails to show that the license tax then imposed was at all considered when the first order was made, and the necessity and equality of the tax is entirely left out of consideration.

III. But even if the county tax on licenses had been properly levied, and before the time when relator demanded his license, still, payment of the county tax could not have been demanded of relator as a condition precedent to his receiving his license; the law provides for the taxing of licenses as a species of property, by the County Court, but until the license is issued it has no existence whatever, and cannot be taxed.

IV. The case of *State ex rel. Meyers vs. Spencer*, 49 Mo., 342, mentioned in the argument of this cause, has no application to the case at bar.

Thos. C. Reynolds, for Respondent.

I. The law regulating the assessment of taxes by County Courts for county purposes in 1870, (W. S., 1870, p. 1196, §§ 76, 78,) is directory, not mandatory as to the time when the assessment shall be made. The order of 27th of June, 1870, did not exhaust the taxing power of the court for that year, and an additional tax, that on licenses, was lawfully assessed on April 20th, 1871. The statute is merely directory as to any day for assessing the tax.

II. Whether or not the collector was correct in demanding a county tax on Grether's license on 19th April, 1871, he had a right to do so on and after April 20th, 1871; the order was

made by the County Court that day, and the mandamus was too late, indeed, it was served only on the next-day, April 21st. Peremptory mandamus was therefore properly refused. (See 49 Mo., 342.)

III. The revenue officer is protected in obeying the order of his superior, in this case, the County Court, and remedies for such orders, if illegal, should be directed against the Superior. If the order of 20th April, 1871, was illegal, the remedy was mandamus, not on the collector to deliver a license, but on the County Court to rescind its illegal order. In such cases, the complete superintending control our statutes give the Circuit Court over the County Court, should be resorted to, and parties considering themselves aggrieved by such orders, should not be encouraged by a lax interpretation of the law of mandamus, injunction, trespass, &c., to vex and annoy officers merely ministerial.

ADAMS, Judge, delivered the opinion of the court.

The defendant was collector of St. Louis County, and the relator applied to him as such for an auctioneer's license on the 19th of April, 1871. The defendant refused to issue the license unless the relator would pay a County tax to be levied on the license,—the tax had not been levied by the County Court at that time—but the County Court on the next day April 20th, 1871, levied a county tax on all licenses, including auctioneers'. The relator without further application, on the 21st of April, had an alternative mandamus issued and served on the relator.

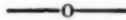
The defendant made return of the facts and the relator demurred to the return, and the court overruled the demurrer and gave judgment thereon in favor of the defendant.

It appears from the return that the County Court had made a general levy for county purposes in June, 1870, for the year ending August 31st, 1871, on all property that had been assessed, but omitted to make any levy on licenses made taxable by the law for State purposes, and on the 20th of April, 1871, the County Court supplied this omission by a proper order to that effect.

The County Court undoubtedly had the power to make the levy in question, and their omission to do so in the first order did not extinguish their authority. When this omission was brought to the attention of the court, it was its duty as the ministerial agent of the county, to supply the defect.

When the tax was levied it became an incumbrance on the license, and the proper time to make the collection is at or before the delivery of the license. (See *State ex rel. Meyers vs. Spencer*, 49 Mo., 342.)

Let the judgment be affirmed. Judge Sherwood absent
The other Judges concur.



STATE OF MISSOURI, Plaintiff in Error, *vs.* JOHN G. FOSS, Defendant in Error.

1. *State vs. Foss, ante*, p.416 Affirmed.

Error to Hannibal Court of Common Pleas.

O. Carstarphen, Wm. P. Harrison, and M. L. Hollister,
for Plaintiff in Error.

W. H. & G. F. Hatch, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

This case is similar in all respects to the one decided at the present term between the same parties, and for the reasons given in that case the judgment of the court below must be affirmed. The other Judges concurring.

City of Cape Girardeau v. Riley et al.

CITY OF CAPE GIRARDEAU, Appellant, *vs.* PHILIP RILEY, *et al.*,
Respondents.

1. *Statute, construction of—Acts of Legislature—Enacting clause—Not essential to the validity of an act.*—The provision of the constitution of Missouri (Art. 4, § 26;) declaring that the style of the laws of this State shall be "Be it enacted" etc, is directory and not mandatory, and an Act regularly passed by the Legislature may be valid when this clause is omitted.
2. *Statute, construction of—Act continuing a former act, not an original one.*—The revision of a law does not have the effect of making the revised law entirely original, so as to be construed as though none of its provisions had effect but from the date of the revised law; when a former provision is contained in a revised law it operates only as a continuance of its existence, and not as an original act.

Appeal from Cape Girardeau Court of Common Pleas.

Lewis Brown, for Appellant.

I. A bill having passed the General Assembly and received the approval of the Governor, although entirely wanting an enacting clause, as set out in the Constitution, Article 4, § 26, is valid. (*People vs. Supervisors*, 8 N. Y., 323-330; *Pacific R. R. vs. Governor*, 23 Mo., 368, *et seq.*, *People vs. Draper*, 15 N. Y., 343-4.)

The Constitution says, (Art. 6, § 26,) "All writs and process shall run * * in the name of the State of Missouri." * * This provision has been held merely directory, and this court, say: "The constitution as well as the statute is merely directory, and neither the one or the other expressly makes void a writ not in conformity to its provisions." (*Davis vs. Wood*, 7 Mo., 165; *Jump vs. Batton*, 35 Mo., 196; *Doan, et al. vs. Boley et al.*, 38 Mo., 450, and see *Cooley's Const. Lim.*, p. 74, *et seq.*) A case directly in point, as to enacting clause is *McPherson vs. Leonard*, 29 Md., 377,—and see *Swan vs. Buck*, 40 Miss., 268; *State vs. Delesdenier*, 7 Texas, 76; *Supervisors vs. Heenan*, 2 Minn. 330; *Washington vs. Paige*, 4 Cal., 388.)

The Constitution itself contains all the inhibition that can exist against legislative action, and the courts cannot add to these inhibitions.

II. If the Legislature act within the scope of the powers

City of Cape Girardeau v. Riley et al.

conferred upon them, and were not prohibited by the Constitution, the courts cannot pronounce their act void, merely because, in their opinion, it is contrary to the principles of natural justice. (*Calder vs. Bull*, 3 Dallas, 399; *Satterlee vs. Mattemore*, 2 Peters, 380; *Fletcher vs. Peck*, 6 Cranch, 87.)

III. The General Assembly may rightfully, by a subsequent act, validate and confirm previous acts of a corporation otherwise invalid. (*Cooley's Const. Lin.*, p. 371-379 and citations; *Dillon Mun. Corp.*, § 42 note 1; p. 346 note 3.) When a statute does not, in express terms, annul a right or power given to a corporation by a former act, but only confers the same rights and powers under a new name, and with additional powers, such subsequent act does not annul the rights and powers given under the former act and under its former name, unless there is an express repeal of such former act.—(*State vs. Mobile*, 24 Ala., 701; *Girard vs. Philadelphia*, 7 Wall, 1; *Commonwealth vs. Worcester*, 3 Pick., 474; *Trustees etc., vs. Erie*, 31 Pa. St., 515-517; *Fowler vs. Alexandria*, 3 Pet. 398-408; *St. Louis vs. Alexander*, 23 Mo., 509.)

Louis Houck, for Respondent.

I. The Constitution of Mo. in 1863, as now, provided that the style of the laws shall be: "Be it enacted by the General Assembly of the State of Missouri as follows:"

This is a mandatory provision of the Constitution of the State. (*State vs. Miller*, 45 Mo., 498.)

In the case of *McPherson vs. Leonard*, 29 Md., 377; it seems that the Constitution of Maryland provided that the style of the Court should be. "Be it enacted by the General Assembly of Maryland;" yet that the Supreme Court held that law with no other enacting clause than "Be it enacted," was valid and constitutional.

The cases of *State vs. Delesdenier*, 7 Texas 94, and *Swan vs. Buck*, 40 Miss., 293, are to the same effect.

In these cases it will be seen an enacting clause of some sort was found, although not strictly following the clause pointed out by the Constitution. But a wide difference exists between

those cases and the case at bar, for in the case now under consideration no *enacting clause* whatever will be found.

It would seem that it is impossible that a statute creating this essential requisite of law should be void.

The cases of *Supervisors vs. Heenan*, 2 Minn., 330, and *Washington vs. Paige*, 4 Col., 388; have no application, and a different rule prevails in regard to the matters decided in those cases in this State. (*State vs. Miller*, 45 Mo., 498.)

The former acts in relation to the incorporation of the City of Cape Girardeau, as well as the subsequent acts cited, cannot be considered upon this demurrer. The petition refers to the Act of 1863 as incorporating the city. The plaintiff might doubtless have amended his petition by referring to some other act of incorporation, but he neglected and refused so to do by standing by his petition.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff's petition alleged an act of incorporation investing plaintiff with power to sue. A demurrer was interposed and sustained, and the important question that arises in the case is the validity of the act of the Legislature incorporating the plaintiff as a city.

The objection taken is that there is no enacting clause to the law, and it is contended that this omission renders it wholly invalid. The Constitution of this State (Art. 4, § 26,) declares that the style of the laws of this State shall be: "Be it enacted by the General Assembly of the State of Missouri as follows:" and we are now to determine whether the provision is imperative or directory only. There is no doubt as to the regular passage of the act, its approval by the Governor, and its publication by the authority of the State.

In the early period of English history there was no fixed and certain style adopted in the passage of laws. It shifted and took different shapes in different reigns. But the most of the American States, when they entered upon a new order of things, adopted a style which they declared should be pursued.

The question is not one of construction, for the language of the Constitution is clear and explicit, but simply one of application. How is this particular provision to be applied, and what shall be the consequence of a disobedience of its directions?

If the provision is to be held as directory only, and not mandatory, the rule is that it may be disregarded without rendering the act void. The rule declared by Lord Mansfield in *Rex vs. Loxdale* (1 Burr, 447,) that, "there is a known distinction between circumstances which are of the essence of a thing required to be done by an act of parliament, and clauses merely directory" has been followed by a long train of cases, and is now universally recognized. And where the language used does not import that it is of substance, the clauses of a law directing its observance are regarded as directory simply, for that is directory which is not of the essence of the thing to be done.

In the case of the *Pacific Railroad vs. the Governor*, (23 Mo., 353,) which was an application for a mandamus to the Governor, requiring him to issue the bonds of the State to a railroad company under a law alleged by him to have been passed by the Legislature over his veto, without the observance of the forms prescribed by the Constitution, this Court held that, notwithstanding the constitutional forms were not complied with, still the law was not void. In the opinion it is said: "The course required to be observed in the performance of an act is not always of its essence or vitality. When an act is directed to be done in a particular way, the direction may be merely directory—that is, it is not of the essence of the act, but the act may stand in law notwithstanding the direction was not strictly observed. This is a familiar principle. * * * All we design to hold is that there are forms to be observed in the enactment of laws; that the members of the Legislature are sworn to observe those forms, and yet, if they are violated, the Constitution never intended that their acts should be void."

The Constitution uses the same language that it has employed

in reference to the style of laws when it speaks of writs and process, and declares that they shall run in the name of the State, yet this clause has always been held to be directory. (Davis vs. Wood, 7 Mo., 165; Jump vs. Batton, 35 Mo., 196; Doan *et al.* vs. Boley *et al.*, 38 Mo., 450.)

The very question presented, arose in a case in Maryland. The Constitution in that State is the same as ours in regard to the style of laws. A law was there passed omitting the required style, and it was decided that the Constitutional provision was directory only and not mandatory, and that the omission of the enacting clause did not render the act unconstitutional and void. (McPherson vs. Leonard, 29 Md., 377.) So in Mississippi, it is held that the provision is directory and that it is not essential that there should be a literal adherence to the formula of words prescribed by the Constitution, but that the acts need only show the authority by which they were adopted, and that it was the intention of the Legislature that they should have the effect of laws. (Swain vs. Buck, 40 Miss., 268.)

After a diligent search I have failed to find any case holding that a law was unconstitutional or void on account of an omitted or imperfect enacting clause.

The enacting clause is certainly not of the essence of the law. It furnishes no aid in its construction, and its provisions are as clear and intelligible without it as they are with it. It is not material in indicating by what authority the law was enacted, for being passed in due form by both Houses of the Legislature and properly approved by the governor, with no allegation of suspicion attached to it, it comes before the courts bearing sufficient evidence that it is really and truly a law.

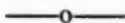
To hold that a law supported by these sanctions was not valid because certain formal and immaterial words were omitted, would be sacrificing substance to mere form, which I think the court is not justified in doing.

Aside from these views, the act we are now considering does not pretend to be an original act. It is to reduce the

law incorporating the plaintiff and the several acts amendatory thereof into one. The revision of a law does not have the effect of making the revised law entirely original, so as to be construed as though none of its provisions had effect but from the date of the revised law.

When a former provision is continued in a revised law, it operates only as a continuance of its existence, and not as an original act. (St. Louis vs. Alexander, 23 Mo., 309.) The Court, therefore, I think, erred in holding the act of incorporation set out in the petition invalid. The other questions raised in regard to the ordinances cannot be decided upon demurrer if they are objectionable; the objection must be raised by answer.

Let the judgment be reversed and the cause remanded. The other Judges concur.



STATE OF MISSOURI, Respondent, vs. WILHELMINE SCHURMANN,
Appellant.

1. State vs. Barada, 49 Mo. 504, and State vs. Schurman *ante*, p. 165, affirmed.

Appeal from St. Louis Court of Criminal Correction.

Eber Peacock, for Appellant.

M. W. Hogan, for Respondent.

EWING, Judge, delivered the opinion of the court.

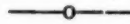
This was a prosecution commenced before a Justice of the Peace in the City of St. Louis, for disturbing the peace. Defendant was found guilty and her fine assessed at five dollars. From this judgment she took an appeal to the St. Louis Court of Criminal Correction, where a judgment was again rendered against her, and the case is brought to this court by appeal.

The only question in this case, namely, whether the Justice had jurisdiction of the offense charged, and if not, whether

State v. Mullen.

prosecution should have been dismissed and the defendant discharged, was passed upon in the case of the State vs. Barada, 49 Mo. 504; and in the case of the State vs. Schurmann decided at this term of the court. (*Ante* p. 165.)

Judgment affirmed. The other Judges concur.



STATE OF MISSOURI, Respondent, *vs.* MARY MULLEN, Appellant.

1. *Practice, criminal—Assault and battery—Complaint—Affidavit before a notary sufficient.*—An affidavit to a complaint for assault and battery sworn to before a Notary Public, is sufficient to authorize the issue of a warrant before a Justice of the Peace.

Appeal from St. Louis Court of Criminal Correction.

Voullaire & Sternberg, for Appellant.

M. W. Hogan, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was a prosecution for assault and battery, commenced before a Justice of the Peace.

The complaint on which the warrant of the Justice was issued was sworn to before a Notary Public of St. Louis County

The point raised here is, that the Justice had no jurisdiction to issue a warrant on an affidavit made before a Notary.

Section three, of the Act concerning Notaries Public, (2 W. S., 959,) authorizes Notaries to take affidavits, and administer oaths and affirmations in like cases, and in like manner as Justices of the Peace. The only object of the information was to authorize the Justice to issue his warrant. If he is satisfied that such information has been duly sworn to before a proper officer, that is sufficient to authorize him to bring the defendant before him for trial.

Judgment affirmed. The other Judges concur.

Patchin v. Bonsack.

LYMAN W. PATCHIN, Respondent, *vs.* FREDERICK BONSAK,
Appellant.

1. *Justices' courts—Appeal—Time, computation of—Sunday.*—In computing the time limited for perfecting appeals from justices' courts, Sundays are to be included as other days. The principle of *dies non* does not apply in such cases.

Appeal from St. Louis Circuit Court.

Rankin & Hayden, for Appellant.

I. The phrase "six days" means six legal days, (W. S., 651, § 12,) that is, six judicial days, and if Sunday is one of the intervening days, as the *act prescribed to be done* on one of the days, cannot be done on that day, Sunday is not to be counted. (National Bank vs. Williams, 46 Mo., 17.)

Sunday is not to be counted as one of the days of the term of a court. (Michie, *et al.* vs. Michie's Admr., 17 Grattan, 109, 111; Thayer vs. Felt, 4 Pick., 354; Penniman vs. Cole, 8 Met., 494; Hannum vs. Tourtellot, 10 Allen, 494.)

Horatio D. Wood, for Respondent.

I. The failure to file the affidavit and appeal bond before Dec. 7th, is fatal to the appeal. (Gen. Stat. 1865, Chap. 188, §§ 11, 12; Robinson vs. Walker, 45 Mo., 117-119; Bernicker vs. Miller, 37 Mo., 498.) See also Gen. Stat. 1865, Chap. 9, as to Construction.

II. The doctrine of "*dies non*" does not apply to this case. (Gen. Stat. 1865, 735, §§ 11, 12.)

The statute fixes the time at which the appeal is returnable, and directs that the appellant shall file his affidavit and bond before that time.

SHERWOOD, Judge, delivered the opinion of the court.

This was a suit before a Justice of the Peace for unlawful, detainer with judgment for complainant, December 1st, 1871; but no affidavit or appeal bond filed until the seventh of that month.

The Circuit Court which was in session at the time the judgment of the justice was rendered, dismissed the appeal on the ground that it was not taken in the time prescribed by law.

The general term affirmed the judgment of dismissal and the case now comes here by appeal.

It appears from the bill of exceptions that the day on which the justice rendered judgment was Friday, and the application for the appeal presented on the following Thursday. And it is now contended by appellant that the intervening *Sunday* was *dies non* and therefore that the appeal was in time.

In other words that when the statute says *six* days, it may mean *seven*.

With equal propriety a party against whom a judgment by default was rendered before a Justice of the Peace, on Saturday the first day of the month, might contend that as *two* Sundays had intervened before the ten days allowed by law had expired, therefore a motion to set aside that default would not be too late, if filed on the 13th of that month.

So also, by like reasoning, a party on whom service was had on Friday, the last day of the month, of process returnable on the seventeenth of the month following, might claim he was not served in time for the ensuing term, because *three* Sundays had occurred between the day of the service and the return day of the writ.

The position taken by appellant is not a whit less untenable than that in the cases above supposed; nor are the statutes applicable to those cases any more plain and unambiguous than the one under consideration.

The evident theory of appellant's argument is, that the act respecting forcible entry and detainer was designed to operate with uniformity, to give to each similarly situated appellant party, an *equal* number of days in which to perfect an appeal; thus six days exclusive of Sundays during the sessions of the Circuit Court, and ten days, Sundays excluded, in vacation in which to do the same thing. A brief examination of sections 11 and 12 of the act referred to, will, however, incontestably show the fallacy of such position. Under those sections an appeal when taken in vacation, *may* be taken within ten days after rendition of judgment, but *must* be returnable to the *first* day of the *next* term; so that in point of fact a party who in vaca-

tion takes an appeal, may be cut down by the operation of those sections to less than *three* days in which to thus proceed, provided a term of the Circuit Court should intervene.

The accident of Sunday intervening, has nothing to do with the proper construction of the act in question. The words of the statute respecting the number of days in which an appeal is to be perfected, are *general*, and therefore must receive a *general* construction and no exceptions, save those enumerated in that act or in acts *in pari materia* are to be allowed.

The case cited by appellant, of the National Bank vs. Williams, 46 Mo., 17, was a case resting upon the proper construction to be given that section of the Practice Act relating to motions for new trials. In that section (2 W. S., p. 1059, § 6,) the Legislature had only in contemplation the regulation of matters which must *of necessity* take place on a court day. Besides it had been expressly provided, (1 W. S., 422, § 34,) that Sunday should not be one of these days, except for the two therein enumerated purposes, that of receiving a verdict, or discharging a jury. And it must be presumed that the Legislature had that provision, as well as the rule of the common law in that regard in mind, and therefore, in prescribing the time in which motions for new trials should be filed, meant four court days, and did not intend that Sunday which was both by the common law and the statute *dies non*, should be included in the computation. So that nothing enumerated in that case is at all applicable here; nor can any such presumption as to the intended exclusion of Sunday, be invoked in the present instance.

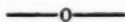
As was well said, in Thayer vs. Felt, (4 Pick. 354,) a case on which appellant also relied, but, which has here no application, "The probable intention of the Legislature must govern" in cases of this sort.

Now, we have a rule for ascertaining the intention of our Legislature laid down by the Legislature itself, and it is this: "Words and phrases shall be taken in their plain and ordinary and usual sense" unless those words and phrases are "technical" and "have a peculiar and appropriate meaning in law."

But there is nothing whatever in either of the sections now under discussion, to in the remotest degree indicate that the expression "within six days" is of "technical import," or is to receive any other signification than the usual and ordinary use of those words would denote.

And again, if any further guide to the conclusion we have reached were needed, where the pathway of Legislative intention is so plain, it would be furnished by the uniform construction, in full accord with our views, which the act under consideration has always received.

For these reasons, no hesitancy is felt in the assertion, that that construction must continue to prevail, and that the phrase '*within six days*' is only susceptible of the meaning placed, upon it by the court below, whose judgment is accordingly, with concurrence of the other Judges, except Judge Wagner who is absent, affirmed.



PATRICK WALSH, Respondent, *vs.* MISSISSIPPI VALLEY TRANSPORTATION COMPANY, Appellant.

1. *Custom*—*To be binding must be actually known, or universal and notorious.*
—A person is not bound by a custom unless he has personal knowledge thereof, or it is so notorious, universal and well established that his knowledge thereof would be conclusively presumed.
2. *Damages for personal injuries*—*Negligence*—*Contributory negligence.*—In an action for damages for personal injuries the rule is, that although the plaintiff may have failed to exercise ordinary care and diligence and such failure contributed in a remote degree to the injury, yet if defendant was guilty of negligence which was the immediate cause of the injury, and with the exercise of ordinary prudence and care by defendant the injury could have been prevented, defendant is liable. But if plaintiff could have avoided the injury by the exercise of ordinary care and prudence, defendant is not liable. And this principle is not confined to any particular class or classes of persons.

Appeal from St. Louis Circuit Court.

Hitchcock, Lubke & Player, for Appellant.

I. This was a clear case of positive and direct negligence on

the part of the plaintiff. He has no right to assume that the hatch was closed, he not being upon a highway, and he was bound to use extraordinary care while he was walking in the dark. (Boland vs. Missouri Railroad Company, 36 Mo., 484; Callahan vs. Warne, 40 Mo., 131.)

Negligence is still a question *of law*. (Devitt vs. Pacific Railroad, 50 Mo., 302.)

The court was bound to say that the facts shown by plaintiff constituted negligence, and that therefore he could not recover.

II. The court below clearly and positively erred in giving plaintiff's instruction as to the custom or usage established by defendant.

a. This instruction was erroneous in that it required the jury to find that plaintiff had personal knowledge of this usage, that is, it required the jury to find that plaintiff had been shown to have *actual* knowledge of it, and prevented the jury from finding constructive notice.

b. Defendant did not plead or attempt to prove a general custom such as is supposed to enter into and form part of a contract. Defendant did establish a proper and usual mode of dealing which the jury were at liberty to consider as an element in the question of negligence. Hence this part of the instruction was misleading and comes within the opinion of this court in Buel vs. St. Louis Transfer Company, 45 Mo., 562.

III. The court below erred in giving plaintiffs instructions concerning negligence.

a. The facts of the case did not warrant the statement of fact made in this instruction that plaintiff's negligence *remotely* contributed to the injury; there was no evidence warranting this comment by the court. At best this part of this instruction was but a hypothetical statement of a proposition of law for which there was no evidence in the case. This should not be done, and if done is error. (Kennedy vs. North Missouri Railroad Company, 36 Mo., 365.)

b. The use of the word "remotely" was wholly improper, and although its use was recommended in the case of Morrissey

vs. Wiggins Ferry Company in 43 Mo., the use of similar language (the phrase "undue carelessness") was held to be error in a late case—that of Buel vs. St. Louis Transfer Company, 45 Mo., 562.

IV. The case of *Morrissey vs. Wiggins Ferry Company*, 43 Mo., 380, is the case of a common carrier of passengers, and the person injured was a passenger, and the court held (see p. 383) that "the degree of responsibility to which carriers of passengers are subjected, is not ordinary care merely, which will make them liable only for ordinary neglect, but extraordinary care which renders them liable for slight neglect," and therefore authorized an instruction which threw the consequence of slight neglect upon the carriers. The case at bar was not the case of a carrier of passengers, and the plaintiff was not a passenger. The rules as to negligence applicable to cases of passenger carriers have no application here. In the case at bar the plaintiff was an employee, and his personal safety was not in the hands of the defendant so that the defendant could be held liable for slight neglect. The burden was upon him to show that through no fault of his, but through and by the carelessness of defendant's servants, he was injured. The court should have stated that defendant was liable only for ordinary neglect, and that defendant was not liable at all, if plaintiff by the exercise of reasonable care and caution would have avoided the accident. (Shearm & Red. on Negl., 27, § 24.)

J. T. Tatum and W. H. Horner, for Respondent.

I. The law of this State is firmly established that in actions for damages arising from negligence, it should be left to the jury to say whether, notwithstanding the imprudence or neglect of the injured person, the defendant could not, in the exercise of reasonable care and diligence, have prevented the injury. There is no difference in law between *negligence* and *gross negligence*. (*McPheeters vs. Hannibal & St. Joseph R. R.*, 45 Mo. 22; *O'Flaherty vs. Union Railway Company*, 45 Mo. 70)

II. If the plaintiff's neglect was slight or remote, and if the conduct of defendant's agents was the immediate and direct

Walsh v. Mississippi Transportation Co.

cause of the injury, and if with the exercise of prudence and the use of proper appliances on their part, the result might have been prevented, the defendant is not excused.

Carelessness of the plaintiff was not the proximate cause of the injury. (*Fitch vs. Pacific Railroad Company*, 45 Mo. 322.)

Contributory negligence will not excuse. (*Id.* See also *Buel vs. St. Louis Transfer Co.*, 45 Mo., 562, and cases there cited; *Morrissey vs. Wiggins Ferry Company*, 43 Mo., 380, 384; *Brown v. Hannibal & St. Joe Railroad Company*, 50 Mo., 461.)

III. The instruction as to custom, refused, is erroneous as it leaves out of view what the defendant should have done, knowing the men were to work before daylight next day.

The law as to custom was properly laid down in the first instruction for the plaintiff.

WAGNER, Judge, delivered the opinion of the court.

The defendant, on one of its barges, brought to the port of St. Louis a cargo of salt consigned to Bogy & Co. The salt was in bulk, and the consignees employed the plaintiff and others to sack and unload the same. Defendant commenced loading hay on the barge before all the salt was removed, and being anxious to have the barge unloaded as speedily as possible, in order that it might be used for the purpose of taking on the remainder of the hay, requested the workmen to work late at night and resume their labors early in the morning. In the afternoon at about five o'clock preceding the accident to the plaintiff, the defendant's superintendent ordered the hatchway on the fore part of the barge to be uncovered for the purpose of ventilation. The hatchway was left open the whole night. Plaintiff returned that evening and worked till about nine o'clock. In the morning he again returned and commenced his work before daylight, and in going across the barge fell through the open hatchway into the hold of the boat and received the injuries for which this suit was brought.

There was no light or any other guard placed around the aperture to warn him of his danger. The verdict and judgment were for the plaintiff.

The record contains no evidence to show that plaintiff had personal knowledge of the hatchway being left open, and he swears positively that he had none. But it was sought to show that there was a custom with the defendant to uncover the hatchway to ventilate the boats, and that the plaintiff must have had knowledge of that fact. Upon this point the court instructed the jury that the plaintiff was not bound by any custom of the defendant as to the ventilation of its barges, unless they believed from the evidence that he had personal knowledge thereof, or unless such custom was so well established and universal that his knowledge of the same would be conclusively presumed. This instruction appears to me to be entirely unexceptionable. If the plaintiff had no personal knowledge that it existed, it would be necessary to show that it was so universal and notorious that it was presumed that all were conversant with it.

But the only question in the case deserving any particular consideration or comment, is the action of the court in giving plaintiff's third instruction; which told the jury that although they might believe from the evidence that the plaintiff failed to exercise ordinary care and prudence while upon the barge of the defendant, which failure might have contributed remotely to his injury, yet, if they believed from the evidence, that the officers, agents or employees of defendant or either of them, were guilty of negligence which was the immediate cause of said injury, and with the exercise of prudence and care by said officers, agents, or employees or either of them, said injury could have been prevented, then the defendant was liable, and they should find for the plaintiff.

In connection with this, the court, at the instance of the defendant, instructed the jury to find for the defendant if they believed from the evidence and circumstances of the case, that plaintiff could have avoided falling into the hatchway of the barge by exercising ordinary care and prudence.

The two instructions taken together constitute a very fair presentation of the law, and the rights and liabilities of the party. The instruction given for the plaintiff is copied from

one which was given in the case of *Morissey vs. The Wiggins Ferry Co.*, (43 Mo., 380,) and has often been approved by this court.

The cases are so numerous in which a similar declaration has been sustained, that if any principle can be considered as established this surely ought to be one. The facts in the case made the declaration proper. The plaintiff perhaps did not exercise the most exact care. He probably did not feel his way to see that every thing was safe, but if he moved in such a manner as a man ordinarily would under the circumstances, and the defendants negligently left the hatchway uncovered, which was the direct and immediate cause of the injury, then the law was properly declared.

But it is contended that although this may be the rule in reference to carriers of passengers, it does not apply to a case like the one at bar. This however is a mistake. The rule was first announced, and the principle had its origin in cases having no connection with passenger carriers.

In the recent case of *Brown vs. The H. & St. Jos. R. Co.*, (50 Mo., 461,) it was distinctly held, that although a person was a trespasser or contributed to his injury by his own carelessness or negligence, yet if the injury might have been avoided by the use of ordinary care and caution by the R. R. Co., they were bound to use that care or caution or they would be liable. Many cases are cited in the opinion directly sustaining that doctrine.

In *Lynch vs. Nurdin*, (1 Ad. & El., N. S., 28,) defendant negligently left his horse and cart unattended in the street. The plaintiff, a child, got upon the cart in play, another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt. Lord Denman Ch. J., delivered the unanimous opinion of the Queen's bench holding that defendant was liable in an action on the case, though plaintiff was a trespasser and contributed to the mischief by his own act; and that it was properly left to the jury whether defendant's conduct was negligent, and the negligence caused the injury.

In *Daviess vs. Mann*, (10 M. & W., 545,) the defendant negli-

gently drove his horses and wagon against and killed an ass, which had been left in the highway fettered in the forefeet and thus unable to get out of the way of the defendant's wagon, and it was held that the jury were properly directed, that although it was an illegal act on the part of the plaintiff so to put the animal on the highway, yet that did not justify the defendant in killing him, and that the plaintiff was entitled to recover. Lord Abinger, Chief Baron, and Baron Parke both delivered opinions reiterating and enforcing the principles laid down by Lord Denman in *Lynch vs. Nurdin*.

So, in the *Mayor of Colchester vs. Brooke*, (53 Eng. Com. Law 339,) where oysters were placed in the channel of a public navigable river, so as to create a nuisance, yet a person navigating the river was holden not justified in running his vessel against them, when he had room to pass without so doing.

There are a great number of cases establishing this doctrine and many of them are cited in the opinion in *Brown vs. H. & St. J. R. R. Co.* But it is not deemed necessary to discuss them further. The rule is settled and can not now be shaken.

In the present case the plaintiff at the request of and for the accommodation of the defendant went to his labor at an unseasonable time, before there was sufficient light to see anything around him. He had a right to act on appearance and to presume that the defendant had been mindful of his rights, and had not done anything which would produce injury to him. If defendant did the act which was the immediate cause of the mischief, and plaintiff did not directly contribute thereto, then defendant's liability is unquestioned. The question of negligence was properly submitted, under fair instructions, and the judgment must be affirmed. Judge Sherwood absent. The other Judges concurring.

ANNA BENKENDORF, Appellant *vs.* FREDERICA VINCENZ, *et al.*,
Respondent.

1. *Mortgages and Deeds of Trust—Sales—Advertisement—St. Louis Legal Record—Publication in, imparted notice.*—The St. Louis County Legal Record and Advertiser was a newspaper, for the purpose of publishing judicial notices, and an advertisement in that paper of a sale under a Deed of Trust imparted notice, and satisfied the requirement of the deed. (*Kellogg vs. Carrico*, 47 Mo., 157, affirmed.)
2. *Mortgages and Deeds of Trust—Sale under Deed of Trust—Sale of property in a lump, not per se sufficient to invalidate sale.*—The mere fact that property conveyed by Deed of Trust is sold under the deed, in gross, is not *per se* sufficient to invalidate the sale. There must be some attendant fraud or unfair dealing or abuse of the confidence reposed in the trustee, in order to obtain the aid of a court of equity to divest a title acquired under such a sale.

Appeal from St. Louis Circuit Court.

John F. Darby, for Appellant.

I. The bill charges that one of the papers in which the advertisement of the Trustee was printed, the St. Louis County Legal Record and Advertiser, was not a newspaper in the proper sense of the word, and that therefore a publication therein was not sufficient.

This is fully admitted by the first three defendants, who made default and filed no answer; and it is not denied in the answer of the other defendant, who was permitted to answer, so that the facts as charged are admitted by all the defendants; and therefore the advertisement was not published as required by the terms of the Deed of Trust.

II. The property was sacrificed at what was less than half its value, viz: \$960, being sold in a lump and not in lots as it should have been, and as it had been done more than eight years before, when Benkendorf bought it at public sale, and when it was sold in separate lots, one lot at a time, and when he paid more than two thousand dollars for the same property, as shown by the evidence; when there were no improvements to any extent near or in the neighborhood of this property. He in like manner when he executed the Deed of Trust to Hertter, the Trustee, deeded and described the lots one at a time, and numbering and describing them as they had been

Benkendorf v. Vincenz, et al.

numbered and described when sold by the city; and the money was borrowed on them as numbered, when the money was borrowed of Frederica Vincenz. The Trustee Hertter, put up the whole six lots and sold them in a lump, when there was not a single bidder present, except Steele the agent of Frederica Vincenz. This is admitted in the answer, and is attempted to be justified on the ground that it was suburban property, outside the city. This was clearly against right and justice and was a violation of the duties of the trustee; and the property should have been sold in lots, according to the sub-division, one lot at a time, as it had been sold originally by the City of St. Louis, when the same property had been sold for more than double the amount, some eight years and a half before. The Trustee in making the sale, is the agent of both parties. (27 Mo., 77; Goode vs. Comfort, 39 Mo., 313.)

"Sale of land and town lots *en masse* which are susceptible of division, is illegal, and the sale will be set aside." (Day vs. Graham 6 Ill., 435; Woods vs. Morrell, 1 John. Ch., 103; Wakefield vs. Campbell, 20 Maine, 393.) And the rule becomes directly imperative, that where the lots have been previously sub-divided into separate and distinct lots, that the division shall not be disregarded by the trustee, and the lots sold in a lump or one body, as if no such division had been made. (Fine vs. St. Louis Public Schools, 30 Mo., 166; Chesley vs. Chesley, 49 Mo., 540; Greenl. Evid., § 316; Evans vs. Wilder, 5 Mo., 319; S. C., 7 Mo., 362; Evans vs. Ashley, 8 Mo. 177; Hill on Trusts., 479-480-495; Lewis on Trusts, 367; Gray vs. Shaw, 14 Mo., 341; Rector vs. Hart, 8 Mo., 460; 2 Am. Law Reg., 712; 27 Mo. 77; Conway vs. Nolte, 11 Mo. 76; Goode vs. Comfort, 39 Mo. 313.)

Finkelnburg & Rassieur, for Respondents.

I. Selling in a lump is not *per se* ground for setting aside a trustee's sale. It is a matter of discretion with the trustee under all the circumstances of each case. (Goode vs. Comfort 39 Mo., 313; Taylor's Heirs vs. Elliott, 32 Mo., 175; Kellogg

vs. Carrico, 47 Mo., 157; Carter vs. Abshire, 48 Mo., 300; Ross vs. Mead, 10 Ills., 171; Gillespie vs. Smith, 29 Ill., 473; Singleton vs. Scott, 11 Iowa, 576.)

The true question in all such cases, is not whether the property was or was not sold in a lump, but whether such a mode of selling was in fact an act of unfairness in the particular case, and resulted in such injury to the debtor as to warrant the Court in exercising its equity powers for the purpose of setting aside the sale. There is no inflexible, arbitrary rule, requiring a sale in sub-divisions in all cases.

A paper devoted to the gathering up and dissemination of legal news is a newspaper, and in that sense the St. Louis Legal Record and Advertiser was a newspaper, and publication in it imparted notice of a sale under this deed of trust. (Kellogg vs. Carrico, 47 Mo., 157.) The act of March 5th, 1861, (Session Acts 1861, p. 100) requires all notices of sale under deeds of trust to be advertised in this paper, and the act was not repealed until March 23, 1863.

SHERWOOD, Judge, delivered the opinion of the court.

This was a suit in the nature of a bill in Chancery, instituted in the Circuit Court of St. Louis County by Anna Benkendorf, against Frederica Vincenz and others, for the purpose of canceling a certain deed of conveyance executed to said Vincenz by one Hertter, as trustee, (under a deed of trust made to the latter in the year 1859, by Oswald Benkendorf, deceased, former husband of plaintiff,) of lots 5, 6, 7, 8, 9 and 10, of Block 1 of the first sub-division of the City Commons, to secure a loan of \$900 (from said Vincenz, to said Benkendorf—) and also to cancel a conveyance for the same property subsequently made by said Vincenz to Fritchey and wife, who together with the trustee were also made parties defendant to the proceeding.

The petition, as grounds for the relief sought, charges fraud and divers irregularities and abuses in the advertisement and conduct of the sale, which took place in October, 1862, after the death of the grantor, and nearly two years after the maturing of the note. This suit was brought in 1870.

There are many minor exceptions scattered through the record, which are not worthy of specific attention, and consideration will therefore only be given to the two points which constitute the chief basis of complaint, viz :

First, that the "St. Louis County Legal Record and Advertiser," in which was printed the advertisement for the sale of the property under the deed of trust, was not a "newspaper."

Second, that the property was sold "in a lump."

The first point was expressly decided by this court in Kellogg vs. Carrico, 47 Mo., 157, in which it was held that the paper referred to was *a newspaper*; and from that ruling I see no reason, and feel no inclination to depart.

As to the second point :

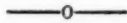
While it is true that sales of this character will be narrowly watched, and every possible safeguard thrown around the interest of him who has been truly called "a servant to the lender;" yet the *mere fact* that the property conveyed by deed of trust is sold *in gross* is not *per se* sufficient to avoid the sale; and no case that I am aware of has gone to that length. There must be some attendant fraud, unfair dealing, or abuse by the trustee of the confidence reposed in him; or some resulting injury from a sale made in this way, in order to obtain the aid of a court of equity to divest a title thus acquired.

In the very nature of things some latitude of discretion ought in this regard to be allowed the trustee, indeed the very instrument conferring the power, contemplates this, and so long as his acts are free from any suspicion of bias, and that discretion is not arbitrarily nor unsoundly exercised, those acts will be exempt from equitable interference.

The evidence in this case, of which thorough examination has been made, by no means discloses anything in support of the charges contained in the petition; but on the contrary it would seem that the transaction is susceptible of but one construction, that of fairness and good faith, and that the property in question brought all that it was worth, or at least, all

that it would have brought, even if sold "lot by lot" in those troublous times—during which the sale referred to took place.

For these reasons, the judgment rendered in the court below in favor of the defendants, will, with the concurrence of the other Judges be affirmed.



HENRY C. CRILEY, *et al.*, Respondant, *vs.* CHARLES VASEL, Appellant.

1. *Sales—Personal property—Partnership—Change of possession.*—A. being in partnership with B. & C., sold his interest in the firm to B. & C. but remained with the new firm as their employee; *held*, that no further change of possession was necessary to render the sale valid as to the creditors of A.
2. *Constable—Deputy—Replevin—Judicial process.*—An action for the claim and delivery of personal property may be brought against the deputy constable, who has seized it by virtue of an execution in his hands against a third party.

Appeal from St. Louis Circuit Court.

S. S. Merrill, for Appellant.

I. There was no sufficient change of possession of the property. (Clafin vs. Rosenberg, 43 Mo., 593; Gillham vs. Kerone, 45 Mo., 487.)

II. An action for the claim and delivery of personal property seized on execution, must be brought against the officer, who in the view of the law has the possession, though the seizure was made by his deputy. (Richardson vs. Reed, and Skilton vs. Winslow, 4 Gray, 441.)

Frank J. Bowman, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This action was brought under our Statute in reference to the claim and delivery of personal property.

The action was brought before a Justice of the Peace, and was for the recovery of the possession of one unfinished wagon, one old wagon, one anvil, and a few bars of iron, of the aggregate alleged value of one hundred and fifty dollars, and also

Criley, et al. v. Vassel.

for the recovery of fifty dollars damage for the unlawful taking and detention thereof.

A trial was had before the Justice, where the plaintiff recovered a judgment, from which the defendant appealed to the St. Louis Circuit Court, where the plaintiff again recovered a judgment. The facts as they appear in the record are, that on or before the 18th day of February, 1870, plaintiffs and their father Conrad Criley had been partners, working at the blacksmithing business in St. Louis County; that on said Eighteenth day of February, 1870, said partnership was dissolved, and that there was but little property on hand belonging to the firm. That the partnership up to the dissolution was carried on in the name of Criley & Sons; after the dissolution in the name of Criley & Brothers. That the business at the dissolution was settled up, and Conrad's interest, which was upon a settlement only about forty dollars, was paid to him, and the business turned over to plaintiffs' and carried on by them at the same place as it had been carried on before, and in the same name, except that the plaintiffs' hired their father at wages of three dollars per day, and did their business in the name of Criley & Brothers in place of Criley & Sons, and it further appeared that defendants had told some of their friends and customers of the change in the firm. The plaintiffs' were in possession before they purchased out the interest of their father, and continued in possession after the purchase. They had no sign over their door either before or after the dissolution of the first partnership. The evidence also tended to show that a part of the property sued for, was purchased by the plaintiffs' after the formation of the new partnership and that Conrad Criley never had any interest in it. The defendant claims that he is a deputy Constable in St. Louis County, and that an execution was placed in his hands as such, issued on a judgment rendered against Conrad Criley on the 17th day of February, 1870. That by virtue of said execution he levied on the property sued for, and that said property was subject to said execution, and that he was therefore justified in seizing and taking the same. The judgment

and execution were offered in evidence, as well as the return on the execution.

At the close of the evidence the Court instructed the Jury as follows:

5th. "If the Jury believe that any articles of the property in dispute belonged to the plaintiffs, and not to said firm of Criley and Sons at any time, and that neither said Conrad nor said firm had at any time an interest therein, then as to such articles the Jury will find for the plaintiffs."

6th. "If the Jury find for the defendant, they will find what articles, if any, belonged to the plaintiffs, as contemplated by instruction numbered 5. They will then find the value of the property in dispute which they may find belonged to the firm of Criley & Sons, and then find the value of Conrad Criley's interest in such firm property, and lastly the interest of said Conrad in all the property of the firm."

7th. "If the Jury believe from the evidence, that the firm of Criley & Sons was in good faith dissolved, and the property thereof sold and transferred in good faith, and that Conrad Criley did in fact cease to be a partner with plaintiff, and was in fact employed by them to work for them, and that there was an actual and continued change of possession of the articles so conveyed by Criley & Sons to the plaintiffs, then the Jury will find for the plaintiffs."

The defendant objected to these instructions and excepted at the time.

The Court then refused to instruct the Jury at the request of the defendant as follows:

8th. The Jury are instructed, that if they find from the evidence that any other mechanic had labored on any of the property in controversy, but had afterward voluntarily delivered the possession of said property to Criley & Sons, they will find that said mechanic has no lien on said property."

9th. "If the Jury find from the evidence, that the defendant was a deputy constable of this County, and, by virtue of an execution in his hands as such deputy, levied on the property in controversy in this suit, they will find for the defendant."

The defendant excepted to the opinion of the court in refusing these last instructions. After the rendition of the judgment in the Circuit Court at Special Term, the defendant in due time filed a motion for a new trial, on the ground that the Court had rejected proper evidence offered by defendant, and that the court had given improper instructions, and refused to give proper and legal instructions, and that the verdict was against law and evidence, and the weight of evidence. This motion was overruled by the Court, and the defendant again excepted and appealed to the General Term of said Circuit Court, where the judgment was affirmed, and the cause brought here to be reviewed.

The question of the fairness and good faith of the plaintiffs and Conrad Criley in the dissolution of their partnership, and in the purchase of Conrad's interest in said partnership property and business by plaintiffs, having been fairly submitted to the Jury by the instructions of the Court, before which the case was tried, that matter is not open for inquiry here. It is complained however, that there was no change of the possession of the property at the time of the dissolution, so as to make the contract and transfer of Conrad's interest in the goods valid as to the creditors of Conrad. It may be observed, that the plaintiffs were already in possession of the goods; to make an actual and visible change of that possession, would be to take the possession from plaintiffs in place of transferring it to them. This property was not in the possession of the vendor, nor was it under his control, except as his possession was a joint possession with the plaintiffs; in such case no other change of possession could in the nature of things take place than did take place, and the cases referred to by the Appellant do not apply; but the Court in the instructions given, directed the Jury that before they could find for the plaintiffs, they must believe that there was an actual and continued change of the possession. I hardly think that this instruction was exactly applicable to the case, but if it was wrong it was because it was too favorable to the defendant and he cannot complain. The instructions given by the

Seyfarth v. St. Louis & Iron Mountain R. R. Co.

Court placed the case at least in as favorable a light before the Jury, for the defendant, as the law would permit, and while I cannot exactly see the object in some parts of the instructions numbered six, yet it surely was not detrimental to the rights of the defendant, and could not in any way effect injuriously the rights of either party, and taken all together, the case was fairly presented to the Jury.

The defendant however complains that the Court refused to give the Jury the instructions asked by him. The first of which, numbered eight, it cannot be conceived what relation it had or could have to the case being tried, and the other assumed that a man who was deputy constable, and had an execution against (A), might seize the property of B., and forcibly take it from his possession, and not be liable to B., but that B., must seek his remedy for this trespass against the constable, who had nothing to do with it and really had no possession of the property sought to be replevied. It needs no argument or citation of authorities to show that this is an erroneous view of the law. The Court properly overruled the instructions.

Judge Sherwood not sitting, the other Judges concurring, the judgment of the St. Louis Circuit Court is affirmed.

—o—

CHARLES O. SEYFARTH, Respondent, *vs.* ST. LOUIS & IRON
MOUNTAIN RAILROAD COMPANY, Appellant.

1. *Common Carrier—Action against, for goods lost—Value of goods—Evidence.*
—In the trial of a suit against a carrier for the value of a chest and its contents, which were enumerated in the petition, a witness after stating the value in detail, of a number of articles was asked if she knew the value of the chest and contents, and answered that she did, and named the value at \$400.00. She also stated that besides the articles she had specifically mentioned, there were some others which she had not named. This statement was not made in answer to any question asked her, but in connection with her testimony relating to the contents of the chest. *Held*, that an objection to her testimony on the ground that there was evidence tending to show that there were more goods in the chest than were sued for, was not well taken.

Seyfarth v. St. Louis & Iron Mountain R. R. Co.

2. *Common Carrier—Suit against for goods lost—Evidence of value.*—In a suit against a common carrier for the value of household goods lost, it is competent for plaintiff to ask a witness as to value, whose opinion is based upon a knowledge of the articles lost, and not on his skill as an expert, his opinion as to their value in bulk. The plaintiff is not obliged to restrict the examination to the value of each article, and in that way arrive at their total value; nor is it incumbent on him to show the process by which the conclusion of the witness is reached.

Appeal from St. Louis Circuit Court.

Dryden & Dryden, for Appellant.

Edward C. Kehr, for Respondent.

EWING, Judge, delivered the opinion of the court.

This was an action to recover the value of goods delivered to, and received by the defendant as a common carrier, for transportation from Irondale to Allenville Station in this State. The goods consisted of a large chest and divers articles contained therein, which it is alleged were never delivered. The answer admits that the defendant received the goods and avers that they were delivered to the plaintiff. There was a trial by a jury and a verdict for the plaintiff for \$373.00. No instructions were asked on either side.

The court, on the trial of the cause, permitted the plaintiff and his wife (who was examined as a witness) to give their opinion as to the value of the chest and its contents. And this is the only question the record presents. The contents of the chest, consisting chiefly of bedding, the wearing apparel of the family and a box of engraver's tools, were put in the chest by plaintiff's wife while he was absent. After the plaintiff in his testimony had enumerated a great many articles of the several classes mentioned in the petition, of which he said he was the owner and which he had left in charge of his wife, he was asked to give his opinion as to the value of the chest and its contents at the time of the shipment, supposing the articles he had mentioned to have been in the chest—having first stated that he knew their value. The answer was \$350.00. On cross examination, he stated the value of a number of specific

Seyfarth v. St. Louis & Iron Mountain R. R. Co.

articles but could not give the value of others. The wife of the plaintiff who put the goods in the chest, gave a fuller and more minute description of the contents of the chest, which corresponded in the main with the articles mentioned in the petition; and after stating the value of a number of them, was asked if she knew the value of the chest and contents, to which she answered \$400.00. These were the only witnesses who testified in the cause, no evidence being offered by the defendant.

It is insisted that the testimony as to the value of the goods in the chest was inadmissible, for the reason that there was evidence tending to show that more goods were put in the chest than are sued for. The plaintiff's wife after giving in detail the contents of the chest, as far as she could remember, said there were some other things in the chest that she had not named. This statement was not made in answer to any question asked the witness, but in connection with her testimony relating to the contents of the chest, and was made without objection.

This was certainly no reason for excluding her *testimony* as to the value of the goods, if it was otherwise competent. If this evidence was deemed prejudicial to the defendant as affecting the question of damages, the effect of it might have been obviated by an appropriate instruction to the jury.

It is also objected that the *form* of the question and the mode of the examination was improper; that the witnesses should not have been asked their opinion of the whole property in mass. Mrs. Seyfarth, the wife of plaintiff (who of course had a better knowledge of the goods than any one else, they being household articles) after being asked if she knew their value and saying that she did, unhesitatingly put it at \$400—a sum in excess of the amount of the verdict. She was not cross-examined by the defendant as to the value. If her estimate was excessive, this could have been shown by the defendant by very obvious tests. But she was not asked to give the reasons of her conclusion or opinion regarding the value, or to state the value of each article, or whether in the estimate

she included any goods that were not described in the petition. Nothing of this kind was asked the witness. The subject of inquiry was not one to which the doctrine in reference to experts applied; and it cannot be questioned that the opinion of this witness as to the value of the articles was clearly admissible under the circumstances. The evidence being competent the plaintiff was not obliged to restrict the examination to the value of each article, and in that way arrive at the total value; nor was it incumbent on him to show the process by which the conclusion of the witness was reached.

The objection is really to the weight or credibility of the testimony, and it was therefore properly overruled.

Judgment affirmed. The other Judges concur, except Judge Sherwood who is absent.

—o—

HERMAN A. HAEUSSLER, Appellant, vs. MISSOURI GLASS COMPANY, Respondent.

1. *Mechanic's lien*.—*To what attaches*.—A mechanic's lien only attaches to such property and fixtures as form part of the realty. (W. S., 907-8, §§ 1-4.)
2. *Trustee's sale*.—*Personal property*.—*How attacked*.—The sale of a trustee under a deed of trust of personal property, can only be attacked by a suit in equity to set it aside by the grantor in the deed of trust, or one claiming under him.

Appeal from St. Louis Circuit Court.

Slayback & Haeussler, for Appellant.

The defendant was present at the sheriff's sale, *and by its silence* and by letting judgment go, is now estopped from denying plaintiff's title. (Dolde vs. Vodicka, 49 Mo., 101; Rice vs. Bunce, 49 Mo., 234-5; State to use, &c. Ross vs. Cave, 49 Mo., 131.)

Hitchcock, Lubke & Player, for Respondent, cited: Collins vs. Mott, 45 Mo., 100.

ADAMS, Judge, delivered the opinion of the court.

This was an action of replevin for various articles of personal property, being tools, implements, moulds &c., for the manufacturing of glass.

The plaintiff claims title by virtue of a sale under a judgment and execution, rendered on a mechanic's lien;—and the defendant claims title by virtue of a deed of trust, and a sale and purchase thereunder. The sale under the mechanic's lien would be the better title, if any title at all passed by such sale to this sort of property.

The description in the mechanic's lien and judgment covered the property by name, but the difficulty is that such lien only attaches to such property and fixtures as form a part of the realty, and not to personal property such as this was, and which, although used in the manufacturing of glass, did not become a part of the realty so as to be subject to the mechanic's lien. The sale therefore of this personal property under the mechanic's lien passed no title. (W. S., 907, §§ 1, 2, 3, and 4; Collins vs. Mott, 45 Mo., 100.)

The deed of trust under which the defendant claims title, covered the same property. The trustee sold it all in a lump, and the defendant became the purchaser. It is objected here, that this sale passed no title.

The plaintiff has no right to raise this objection; if it could be raised at all by him claiming under the grantor in the deed of trust, it could only be done by a suit in equity to set aside the sale. Until set aside by a direct proceeding for that purpose, the trustee's sale must stand. Judge Wagner absent. The other Judges concur.

Ladd, et al. v. Couzins, garnishee.

A. A. LADD, *et al.* Appellant, *vs.* JOHN E. D. COUZINS, garnishee of Nicholas Walton, Respondent.

1. *Garnishment*—*Allowance to garnishee cannot be made after term at which judgment is rendered.*—An allowance to a garnishee is a part of the costs in the case and cannot be granted after the term at which final judgment is rendered, either in the lower or appellate court.

Appeal from St. Louis Circuit Court.

Krum & Patrick, for Appellant.

A. N. Crane and C. S. Hayden, for Respondent.

EWING, Judge, delivered the opinion of the court.

At the March term 1871 of the St. Louis Circuit Court, in special term, an allowance was made to Couzins as garnishee of Walton, which was in the following words namely, "Now at this day comes the said garnishee, J. E. D. Couzins by his attorney, and on his motion it is ordered by the court that said garnishee be allowed the sum of two hundred dollars as an indemnity for the time and trouble expended by said garnishee, and it is further ordered that said allowance be taxed as costs against said plaintiffs, and that execution issue therefor."

A motion "for a new trial" was filed, alleging among other things "*that the judgment against the plaintiff is ordered to be taxed as costs*" and that the allowance is excessive—which motion was overruled. An execution having been issued, plaintiffs in July 1871 filed a petition for a stay thereof, which was also overruled. The Judgment having been affirmed at general term, the cause is brought here by appeal. The original proceeding against Couzins as garnishee of Walton was commenced in 1862 and resulted in his discharge. Whereupon a motion for a new trial was filed by plaintiffs, which being overruled the cause was taken by appeal in November 1862 to this court, where at the June term 1865, the judgment was reversed, and the cause remanded. After the cause was remanded, Couzins filed an amended answer to the interrogatories, to which a denial was filed by the plaintiff, and the cause having been continued from time to time was tried again in March 1868, and the garnishee discharged. This Judgment,

on appeal to the general term, was affirmed in May 1868, from which affirmance, an appeal was taken to this court. An allowance to Couzins was made as already stated in March 1871, by the court at special term. The question presented by the record for our consideration is, can the order of allowance to the garnishee be made after final judgment is rendered discharging him, and after the term of the court at which it is rendered? This involves the construction of the following provision of the statute, namely: "If any plaintiff in attachment shall cause any person to be summoned as garnishee and shall fail to recover judgment against such garnishee, all the costs attending such garnishment shall be adjudged against such plaintiff; and the court shall render judgment in favor of such garnishee against the plaintiff, for a sum sufficient to indemnify him for his time and expense, and reasonable attorney's fees in attending and answering and defending in subsequent proceedings, as garnishee." (1 W. S. 66, § 227.)

There is some obscurity in the statute arising from the use of language, which at first view, seems to make it doubtful whether the allowance to the garnishee for his expenses is inseparable from the general costs in the case, and forms a component part of the judgment rendered in his favor. By the first clause of the section, the garnishee on his being discharged is entitled to judgment for costs *eo nomine*. Under the last clause, he is entitled to a judgment for such sum as will indemnify him for his loss of time and for his expenses in defending the suit.

If the garnishee is obliged to assume the attitude of a litigant, he is entitled to something more than the ordinary costs if the result of the litigation justifies his resistance to plaintiff's claim. The expenses he incurs in thus resisting it, are, like the ordinary costs, but incidents of the litigation. His right to both originates in the same way, and attaches at the same time. In one case, the law has fixed the amount that may be recovered, in the other the court must determine it. The costs are simply the expenses incurred by the parties in the prosecution and defense of the suit; the allowance to the garn-

Ladd, et al. v. Couzins, garnishee.

ishee cannot be regarded in any other light than as costs and should be taxed as such. It follows from this view that the allowance cannot be made after the term at which the judgment discharging the garnishee is rendered inasmuch as it forms a component part of the judgment. It is said that such a construction of the statute would deprive the garnishee of any allowance for expenses, in case of a further prosecution of the case by appeal or writ of error. The answer to this is, that if in such case there should be a reversal of the judgment, no such prejudice could result to the garnishee; for if on a new trial he should again obtain a judgment, the expenses he incurred by reason of the appeal would of course form a part of the allowance. If on the contrary the judgment should be affirmed in the appellate court, an allowance can be made the garnishee in that court for attorney's fees which it might become necessary for him to pay for services rendered there. Although this court has not been called upon heretofore to construe this statute with reference to the proper practice under it in cases like that under consideration, it has received a *practical* construction from this court in conformity with the conclusion to which we have arrived. In *Davis, et al., vs. Meredith, et al.*, 48 Mo., 263, an allowance was made the garnishee for counsel fees in this court without any question as to the propriety of such practice. The Judge who delivered the opinion says, the allowance to the garnishee was for *answering*, but this is evidently a mistake. It could have been for nothing else except counsel fees. This is the construction of the law that will accomplish its purpose, namely; to indemnify the garnishee for expenses incurred by him in the litigation through all its stages, in the appellate as well as in the Circuit Court, unless these expenses are something different from costs and form the subject of an independent demand against the plaintiff, for which a distinct judgment might be rendered, which as I have endeavored to show, cannot be so regarded.

Judgment reversed, the other judges, except Judge Sherwood who is absent, concur.

RUTH CROCKETT, (late BUELL,) *et al.*, Respondents, *vs.* ST.
LOUIS TRANSFER COMPANY, Appellant.

1. *Practice, civil—Petition—Amendment; when relates back—Limitations.*—When an amendment to a petition in a suit for damages, (W. S., 519, § 2.) sets up no new matter or claim, but is merely a variation of the allegations affecting a demand already in issue—as where by the original petition a party was assigned to the wrong side of the case, and the mistake was corrected—it relates to the commencement of the suit, and the running of the statute of limitations is arrested at that point. (Buel vs. St. Louis Transfer Company, 45 Mo. 562, affirmed.)
2. *Damages—Suit for, under statute—Father and mother as plaintiff, divorce of.*—In a suit for damages under the statute, (W. S., 520, § 2,) the father and mother of the deceased child may join as plaintiffs although divorced prior to the accrument of the cause of action. (Buel vs. St. Louis Transfer Co., 45 Mo. 562, affirmed.)
3. *Practice, civil—Parties—Husband to be joined with wife when the marriage has taken place after the commencement of the suit—Amendment, when made.*—When a suit has been begun by a woman who afterwards marries, the petition may be amended so as to make her husband a joint plaintiff; and such amendment under the statute, (W. S., 1034,) may be made at any time before final judgment.

Appeal from St. Louis Circuit Court.

S. M. Breckinridge, for Appellant.

I. The plaintiffs were barred of their action by the statute of limitations, by failure to bring suit within the year. The court below erred in allowing plaintiffs to amend because the amendment changed "substantially the claim and defense." It substituted a new and wholly different action for the old one. Ruth Buell the mother of the deceased child could not sue alone under the statute, she must be joined by her husband, —though divorced—who was father of the deceased child. He could not be made party defendant. He must be a co-plaintiff.

(a.) No action proper was pending so long as the mother was sole plaintiff, and especially during the interval of four months when her husband was not a party on either side. (Knickerbocker Insurance Company vs. Hoeske, 32 Maryland, 317.)

(b.) An amendment in a material matter, as in making a new

party plaintiff without whose joinder recovery was impossible, without notice to defendant, is improper. (Keller vs. Bladell, 2 Nev., 162; Alexander vs. Stewart, 23 Ark., 18; State vs. Martin, 20 Ark., 636.)

Plaintiff, Samuel F. Buell, was barred by statute and beyond doubt, if he is barred, all are barred. (30 Ga., 873-4; 10 B. Monroe, 83; 34 Miss., 437; 4 T. R., 516; 20 Mo., 530; 32 Mo., 144; 37 Maine, 563.)

II. The court erred in permitting the amendment of the plaintiff, in making the second husband John Crockett a party plaintiff. Plaintiffs had full notice by motion of defendant for non-suit at the close of plaintiff's case, that defendant claimed that Crockett was a necessary party. He might at that time have asked to make him a party, though even that is to be doubted. He did not ask to do so until the proof was all in, the case closed and instructions submitted, when upon intimation from the judge of this view of the law, he asked and was allowed to add a new party. Liberal as our statute is in this respect, it is not believed it was intended to cover or does allow such amendments. Plaintiff although fully informed of the defect of parties, refused to amend until the case has reached its last stage, and then ask leave to amend only to avoid an instruction framed and approved, aimed at the defect. But observe the accompanying irregularities, flowing from this untimely amendment. (a.) A new party is added, and yet the jury is not sworn anew. Is the verdict by it rendered binding as to Crockett? Is it a verdict at all—if the jury be not sworn to try the issues as between the parties? (b.) The verdict by its terms excluded John Crockett. Is that a verdict in this case? And can a judgment be entered properly in favor of *plaintiffs*, designed to include Crockett, which rests only on a verdict expressly giving to the plaintiffs, Ruth and Samuel F. Buell, by name and to them only, “\$5,000 damages for the killing of their child?” The *verdict* does not support the judgment. (c.) If Crockett is a necessary party as beyond doubt he is, (2 W. S., Ch. 110, § 8, p. 1001,)—how is he affected by the limitation, and if he is barred, how can the other parties sue? (King v. Avery, 37 Alabama, 169.)

Theodore Sternberg, with J. C. Moody, and M. W. Hogan,
for Respondents.

I. The question raised in relation to the amendment of the original petition by making Samuel F. Buell a party plaintiff instead of defendant, and the questions growing out of the divorce were settled when this case was in this court before. (Buel vs. Transfer Company, 45 Mo., 562.)

II. There was no error in the action of the court at special term in causing John Crockett the husband of the female plaintiff, to be joined as co-plaintiff. (W. S., 1034, § 3-6.) Where there is a defect of parties, advantages of such defect can only be taken by demurrer or answer. If not so taken it is waived. (W. S., Vol. 2, p. 1015, § 10; Goetz vs. Ambs, 27 Mo., 35.)

ADAMS, Judge, delivered the opinion of the court.

This was an action brought under the Damage Act, (1 W. S., § 2, p. 519,) by the father and mother to recover the sum of five thousand dollars as a forfeiture for the death of their infant child, occasioned by the alleged carelessness of defendant's agent in driving one of their transfer wagons.

The suit was instituted by the mother alone, near the close of the statute year for bringing the suit, she being unable to obtain the father's consent to join as co-plaintiff; a demurrer for non-joinder of the father as plaintiff was sustained June the 19th, 1867.

The accident which caused the death, happened March 22d, 1866. And on motion, the father who had been made a party defendant was stricken out as defendant, and made plaintiff so as to meet the ground on which the demurrer was sustained. This amendment to the petition was made October Term 1867.

The plaintiffs Ruth Buell and Samuel F. Buell, had been divorced, as appears from the record.

The defendant's answer was a general denial of all the allegations of the petition, and also set up the statutory bar of one year as having elapsed after the suit was as originally brought by Ruth Buell, and before Samuel F. Buell was made a plain-

tiff by amended petition. This part of the answer was stricken out on plaintiff's motion, and defendant excepted.

At the close of the evidence on both sides, the defendant asked an instruction demurring to the plaintiff's evidence, which was refused by the court, and it was then suggested that Ruth Buell had intermarried with John Crockett, whose name was entered as a plaintiff in the case, to which the defendant excepted.

The jury found a verdict for the plaintiffs for the amount claimed, five thousand dollars.

The usual motions in arrest and for a new trial were made and overruled, and judgment rendered for plaintiffs, from which the defendant appealed to general term where the judgment of special term was affirmed and he has appealed to this court.

The evidence strongly tended to prove the plaintiffs case. The instructions were unobjectionable so far as I can see—and the case seems to have been fairly presented on both sides.

It may be remarked that this case was before this court at the March Term, 1870, (Buell, *et al.* vs. The St. Louis Transfer Co., 45 Mo., 562,) when the judgment of the Circuit Court was reversed because of an erroneous instruction. The error in this instruction was corrected, and there seems now to be no substantial ground of error left for us to pass upon.

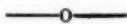
The point raised in regard to the expiration of the year before the father was made a plaintiff was passed on by this court and we see no reason to change the ruling then made.

So also the question of divorce of Mr. and Mrs. Buell and its bearings on the case were settled by that opinion.

The only remaining point is, that John Crockett the second husband of Ruth Buell was made a party plaintiff after the close of the evidence. There is no force in this objection. It was not only right that he should have been made a party, but the omission might have been an error of fact that might have resulted in setting aside the judgment.

Section three (2 Wagner's, 1034,) allows this sort of amend-

ment at any time before final judgment. Judgment affirmed. The other Judges concur.



EDWARD C. FRANKLIN, Respondent, *vs.* THE GLOBE MUTUAL LIFE INS. CO., Appellant.

1. *Agency—Authority, proof of—Written instruments—Habit and course of business.*—The authority of an agent is not necessarily to be proved by written instruments, but may be proved by the habit and course of business of the principal.

Appeal from St. Louis Circuit Court.

Noble & Hunter, and W. T. Sharman, for Appellant.

The evidence showed no authority on the part of the corporation under its charter to make such a contract.

Stewart & Wieting, for Respondent.

The authority of an agent to act for a corporation need not be proved by record or writing, but may be presumed from his acts and the general course of business. (*Warner vs. Ocean Ins. Co.*, 4 Shep. [Maine,] 439.)

VORIES, Judge, delivered the opinion of the court.

This action was brought to recover damages for an alleged breach of contract on the part of defendant, which had before been entered into between the plaintiff and defendant.

It is charged in the petition that plaintiff is a physician and surgeon, and as such was employed by defendant as its medical examiner at St. Louis, except at such times as plaintiff might be absent from the city or unable to attend to such services; that plaintiff was at all times to hold himself in readiness to perform such services, except when absent, &c.; that in consideration for his services, defendant agreed to pay plaintiff the usual price allowed for such examinations, to be paid as follows: Defendant agreed to keep plaintiff's life constantly insured in such amount that the premiums would be equal to

Franklin v. The Globe Mutual Life Ins. Co.

the total amount due plaintiff for his services, and the premiums should be taken up and canceled to the extent of the value of plaintiff's services, as they severally became due.

That about the 29th day of September, 1868, plaintiff in conformity to said agreement, entered upon the service of defendant as such examiner, and from said time until about the month of July, 1869, continued to faithfully perform said duties; that about the 29th day of September, 1868, in pursuance of said agreement, defendant issued a policy of insurance upon the life of plaintiff for five thousand dollars, payable at the death of plaintiff; the premiums of \$50.70 per quarter-yearly were paid by plaintiff by his services as examiner; that afterwards his services amounting to more than the premiums on said policy, defendant issued to plaintiff other policies to the amount of \$5,000, the premiums of which were paid by his services as aforesaid; that the defendant in violation of its said contract, in the month of July, 1869, employed other physicians to make medical examinations as aforesaid, and refused to receive the services of plaintiff, or to pay him therefor, or otherwise perform said contract, and refused to keep the life of plaintiff insured, and to receive his services as aforesaid in payment thereof, as it had agreed to do by said contract; that at the time of said breach of said contract by defendant, its said business was increasing, so that if defendant had complied with its contract, the fees which would become due plaintiff, would have been sufficient to pay the premiums on a policy on plaintiff's life for ten thousand dollars; that by means of the breach of said contract plaintiff has been damaged in the sum of ten thousand dollars, for which judgment is claimed.

The defendant in its answer denied the making of any such contract with plaintiff, as is alleged by him in his petition, or that any services were ever rendered by plaintiff for defendant under or by virtue of any such contract. The answer states, that plaintiff applied to defendant's agent in St. Louis, about the 24th day of September, 1868, under the rules of said Company, for a policy of insurance on his life in the sum

of \$5,000, that upon the payment of the sum of \$50.70 and the agreement to pay said sum by plaintiff, quarter-yearly thereafter, said Company issued to the plaintiff its policy for the said sum of \$5,000; that the policy was issued on the condition that plaintiff would pay the said quarterly payments, and otherwise comply with the conditions of the policy; that said policy is still in full force, plaintiff having paid the last quarterly payment in cash; that since said policy was issued, the plaintiff, being a physician, was called on by the agent of the defendant to make examinations of persons applying for insurance in said Company, and that for his services he was allowed three dollars for each examination, and that plaintiff without any contract or arrangement with defendant or its agent, as a matter of convenience to himself, allowed his fees for services to be retained by the agent of the defendant, to be used by plaintiff in the payment of his quarterly payments, as aforesaid; that plaintiff made a second application for a second policy of insurance on his life, to the agent of defendant at St. Louis; that the policy was issued and placed in the hands of said agent, but never delivered to plaintiff, he not having paid the premium on the same.

A replication was filed by the plaintiff, denying the affirmative matters in the answer. A trial was had before a jury.

The plaintiff was sworn and examined as a witness before the jury. By his evidence, he fully proved the allegations in his petition, showed that his contract was made with Brawner, the agent at St. Louis, and agreed to by one Hardenburgh, the 2nd Vice President of the defendant; he also testified that the contract was to last during his life, or as long as he was able to perform the services required. The defendant objected to any statements of any agreements made between plaintiff and Brawner or Hardenburgh, on the grounds that it was not proved that they had power to bind the defendant. The evidence was admitted and the defendant excepted.

The plaintiff then read in evidence the policy of insurance given him, as stated in the petition and answer, also what purported to be an appointment of plaintiff as examining physi-

cian for the defendant, purporting to be signed by the secretary thereof, also several letters purporting to be a correspondence had with plaintiff by the officers of defendant at New York, also the notes given by plaintiff for premiums on the policy on his life; all of these were admitted in evidence without objection, and fully show, that Brawner was agent of the Company, and that the Company recognized the employment of plaintiff by Brawner, and a number of the letters were signed by Hardenburgh. The plaintiff also offered evidence to prove the amount of his damages.

At the close of the plaintiff's evidence the court instructed the jury as follows:

"The jury are instructed that from the evidence the plaintiff is not entitled to recover."

Upon the giving of this instruction, the plaintiff took a non-suit, with leave to move to set the same aside. The motion to set aside the non-suit was made on the ground that the court had erred in giving said instruction. The motion was overruled, and the plaintiff excepted. The plaintiff appealed to General Term of St. Louis Circuit Court. The judgment of the Special Term was reversed, and the cause remanded to the Special Term, from which last judgment the defendant appealed to this court.

It is insisted by the defendant in this suit, that the time for the duration of the contract stated in plaintiff's petition is not fixed by the contract. It is true, that it is not stated in the petition, that the contract was by its force to continue for the life of plaintiff. It is stated, that as a part of the contract defendant agreed to keep plaintiff's life insured, and to pay the insurance at his death. The statements as made might not have been considered sufficient on demurrer, but the defendant did not demur, but made issues upon the facts stated in the petition, and went to trial thereon. The evidence on the trial tended to prove a contract as charged in the petition, and fixed its duration for the plaintiff's life, or until he became unable to perform the services of a medical examiner, and then tended to prove a breach of the contract

on the part of defendant. This was slightly variant from the allegations in the petition, and the court might have been justified in rejecting the evidence on this ground, if it had been objected to. If this had been done, the plaintiff might have amended his petition. (W. S., 1033, § 1 and following.) This was not done, but the evidence was heard, and the court at close of the evidence instructed the jury, "*that from the evidence plaintiff was not entitled to recover.*" This I think was erroneous. The defendant also contends that there was no evidence to show that defendant was authorized by its charter to make the contract sued on. The Charter was not produced on the trial, but the evidence shows that the defendant had employed medical examiners in its business, and the nature of its business would naturally imply the necessity of such employment by the company, and in such case it is not to be presumed that the company was acting without authority; at least they would not be permitted to rely on their want of authority, where there was no proof on the subject.

It is further contended by the defendant, that the court improperly admitted evidence to be given of a contract made by the agent Brawner, without proof having first been made, that Brawner was the agent of defendant. It is a sufficient answer to this, that the answer admits that it had an agent in St. Louis, that the application of plaintiff was made to such agent for a policy of insurance, that said policy had been issued, and premium notes given to said agent. That the agent had employed plaintiff as a physician to examine applicants for insurance made to said agent. In fact the answer admits the agency and the employment of the plaintiff, but denies the contract relied on by plaintiff; and the notes and letters read in evidence without objection, clearly show that Brawner was agent, and that his acts in employing plaintiff were fully recognized and acted on; but defendant denies that he made such a contract as that stated by plaintiffs.

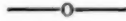
The act of an agent must be authorized or approved by the company. The proof of authority is not confined to written evidence conferring the authority. (33 Ind., 185; 5

State, to use etc., v. Platt, et al.

Wheaton, 326,) and the agency may be proved by the habit and course of business and dealing between the parties; (Walsh *et al.* vs. Pierce, 12 Vermont, 130; Chicago & N. W. Railway Co. vs. James, *et al.*, 22 Wis., 194.)

I think that the agency was admitted in the answer, as well as shown by the evidence, and while the evidence is not free from doubt, yet it tended to show a cause of action, and the case ought to have been submitted to the jury. If it should be shown on another trial, that the plaintiff could have procured employment as profitable as that entered into for the defendant, his damages might be very small, but with that we have nothing to do.

The other Judges concurring, the judgment of the General Term of the St. Louis Circuit Court, reversing the judgment of the Special Term and remanding the cause, is affirmed. Judge Sherwood not sitting.



STATE OF MISSOURI, to the use of HENRY GRASSMUCK, Respondent, *vs.* HARRY S. PLATT, *et al.*, Appellants.

1. *Constable—Indemnity bond—Claim and delivery of personal property.*—After the execution of an indemnity bond to a constable, for property seized by him on execution, the claimant of the property has no remedy against the constable.
2. *Practice, civil—Actions—Indemnity bond, suit on—Replevin against constable—Bar—Damages.*—A constable seized property by virtue of an execution in his possession, and took an indemnity bond. B. claiming this property brought an action of replevin against the constable, wherein he was defeated. He afterwards sued on the indemnity bond. *Held*, that, inasmuch as the question of ownership was not involved in the replevin suit, that suit was no bar to the suit on the indemnity bond; and inasmuch as the constable elected in the replevin suit to take the value of the property, that the plaintiff in the suit on the bond, was damaged at least to that amount.
3. *Practice, civil—Replevin—Judgment—Constable—Proceeds.*—When a constable recovers judgment in a replevin suit brought against him for property seized by him on execution, and elects to take the value thereof, the value so obtained, takes the place of the property, and must be disposed of by him accordingly. He must pay off the original execution and costs, and hold the balance for the bondsmen against whom the judgment is rendered.

Appeal from St. Louis Circuit Court.

M. L. Gray and John M. Holmes, for Appellants.

The replevin suit and the judgment therein being all the result of plaintiff's wrongful act, it was allowing him to take advantage of *his own wrong* to put the record in evidence against defendants.

The natural and legitimate damages that plaintiff sustained as a direct consequence of a levy, he could recover on showing what they were, and in the absence of proof of what they were he could only recover nominal damages for the levy.

The defendant in the replevin suit only claimed a special property in the horses, to wit: to satisfy his \$80 execution, and the assessment of damages in that case in favor of the constable of \$400; in full value of the horses, the plaintiff there and here being the owner, was manifest error, and defendants in this case cannot be made responsible for the erroneous assessment of the damages in the replevin case. (30 Mo., 149; 35 Mo., 271.)

No party can recover damages to which he has contributed, or which by proper and ordinary care on his part, he might have prevented. (Sedgw. on damages, 4th Edition, top p. 103, 158; 18 Mo., 362; 7 Greenlf., 51; 17 Pick., 284; Shearman and Redfield on negligence, § 25, *et seq.*)

Davis, Thoroughman & Jones, for Respondent, cited: Bell vs. Hoagland, 15 Mo., 360; Taylor vs. Larkin, 12 Mo., 103; Corl vs. Riggs, 12 Mo., 430; Clemens vs. Murphy, 40 Mo., 121; 17 Ill., 25; 19 Ill., 207.

ADAMS, Judge, delivered the opinion of the court.

Henry Grassmuck was the owner of three horses, which were levied on by a constable of St. Louis County, by virtue of an execution issued by a Justice of the Peace in favor of the defendants, Platt and Thornburg, against one Julian. After the levy, Grassmuck, under the Act of the Legislature entitled, "An act concerning the duties of Sheriff, Marshall, and Constable, in the county of St. Louis, in relation to the levy

and sale of property under execution and attachment, as may be claimed by third persons," approved March 3, 1853., (See Session Acts 1855, p. 464), claimed the horses as his property, and the bond now sued on was executed and delivered to the constable by the defendants to indemnify the claimant for all damages he might suffer in consequence of such levy, and in consequence of any sale that might be made under the execution.

After the execution of this bond, the claimant, Grassmuck, brought an action in the nature of a replevin against the constable, and had the property delivered to him in that action.

The constable set up the bond in suit as a bar to the action, and recovered judgment against the claimant for the value of the property—\$400. The claimant then brought this suit in the name of the State to his use on the indemnity bond, and recovered judgment which was affirmed at General Term.

The defendants set up as a bar, the judgment in the replevin suit, and also contend, that, if the plaintiff is entitled to recover, he can only recover nominal damages.

1. The claimant, when he sued the constable in replevin, mistook his remedy. After the execution of the indemnity bond he had no remedy against the constable, and the bond operated as a bar to that suit without regard to the real ownership of the property. (See Sections 1, 2, 3, 4 and 5 of the act above referred to, Session Acts 1855, p. 464-5.)

2. As the question of ownership was not involved in the replevin suit, the judgment in that suit is no bar to this action. The only question raised in the replevin suit was, whether there had been a bond of indemnity, and the production of the bond determined the case in favor of the constable.

3. The constable in the replevin suit had judgment for the value of the horses, and elected to take this value, \$400, instead of the horses themselves. The plaintiff therefore was damaged in consequence of the levy of the execution on his property, at least to the amount of the \$400, and this was the amount of the verdict in this case. After the levy of the ex-

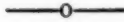
Thompson v. St. Louis Mutual Life Ins. Co.

ecution, the constable became the lawful custodian of the horses under the levy and the bond of indemnity.

The value of the horses recovered by the constable took the place of the horses, and must be disposed of in the same way. Out of this value the constable must pay off the execution and costs, and hold the balance for the bondsmen against whom the judgment is rendered.

Whether the defendant in the execution, whose debt has thus been paid, can be compelled to refund the amount, and to whom, are questions not involved in this record, and need not be passed on.

Judgment affirmed. Judge Sherwood absent. The other Judges concur.



**MACKLOT THOMPSON, Respondent, vs. ST. LOUIS MUTUAL LIFE
INSURANCE COMPANY, Appellant.**

Contracts—Insurance—Premium, prompt payment of—Waiver.—Though a contract of insurance requires prompt payment of the premium or the policy will be forfeited, yet the insurers may waive this condition by a habit of receiving the premium after it is due.

Appeal from St. Louis Circuit Court.

Cline, Jamison & Day, for Appellant.

This case stands on simple naked acts of indulgencies granted to the plaintiff, for two successive years.

The memorandum referred to, formed a *part* of the *policy itself*. (Stocking vs. Fairchild, 5 Pick. 181; Gurnerson vs. Murray, 4 N. H., 171; Roberts vs. Chenango County Mutual Insurance Company, 3 Hill, 501; 1 Phillips on Ins., § 68, p. 51; 1 Arnold on Insurance, p. 41.)

Bakewell, Farish & Mead, for Respondent.

The proof showed that in regard to the previous payments of the annual premiums, they had always been paid weeks

after they were due, and received by the defendant without objection, and therefore the instruction given was correct. (Buckbee vs. U. S. Ins. Co., 18 Barb. 541; McClure vs. Philadelphia Ins. Co. 6 Penn. State., 107; Ruse vs. Mutual Benefit Life Ins. Co., 26 Barb. 556.)

ADAMS, Judge, delivered the opinion of the court

This was an action on a policy of insurance issued by the defendant to Alfred C. Bernoudy, whereby in consideration of two hundred and thirty and twenty-eight hundredth dollars paid by him, and an annual premium of the same amount to be paid on or before the 28th day of March, in each and every year next after the date of the policy for nine years, the Company assured the life of said Bernoudy, in the sum of three thousand dollars, to be paid to the plaintiff at the expiration of the nine years, or if Bernoudy died in the meantime, to be paid in ninety days after due notice or proof of his death.

The policy provided that if default should be made in the payment of any of the annual premiums at the time limited for their respective payments, such default should not work a forfeiture of the policy but the three thousand dollars insurance should then be commuted or reduced to such proportional part of the whole sum insured, as the sum of the annual payments that had been paid, should bear to the ten annual payments stipulated to be paid by Bernoudy.

And it was also provided, that if the insured should fail to pay annually in advance the interest on any unpaid notes or loans, which might be owing by him to the Company on account of any of the annual premiums, then, and in every such case, the Company should not be liable for the payment of the amount of insurance, or any part thereof, and the policy should cease and determine.

Bernoudy, whose life was insured, died before the expiration of the nine years, and the plaintiff under the policy claimed the whole amount of insurance. The defendant claimed a commutation of the amount of insurance, upon the alleged ground that default had been made in payment of the

annual premiums on the days stipulated. And the defendant also set up two additional defenses of a forfeiture of the policy, by reason of the non-payment in advance of interest on premium notes.

At the foot of the paper on which the policy was printed and written, but not embodied in the policy itself, there appeared to be the following printed memorandum: "N. B. Agents of this company are not authorized to grant permits, or to make, alter or discharge contracts, or waive forfeitures. If a premium is received by the company after the day named in the policy for its payment, it is considered by the company and the assured as an act of grace or courtesy, and forms no precedent in regard to future payments."

The evidence in the case showed that the premium due on the 28th of March, 1870, was not paid or tendered on that day, but in two days thereafter the same was duly tendered but refused. The proof showed that in regard to the previous annual payments commencing in March, 1868, they had always been paid weeks after they were due, and received by the defendant without objection. In regard to the premium of the previous year, it was paid six weeks after it became due and received without any objection, and that there had been no change in the health or condition of the deceased. It also appeared that the plaintiff had another policy in this company, which was running and in force during the same time as the policy sued on, and that in regard to the premiums accruing under this policy it was the practice of plaintiff to pay, and the defendant to receive the premiums long after they were due.

The court at the instance of the plaintiff and against the objections of the defendant instructed the jury: "If the jury believe from the evidence, that it had not been the practice of the defendant to exact prompt payments of premiums when due under the policy sued on; that they had allowed the said payments to lie over for several days or weeks after they became due, and then accepted payment of said premiums, then these are facts from which the jury may find, that the defend-

ant waived a literal compliance with the condition as to punctual payment. And if the jury further find that there was such a waiver, and that in a few days after the 28th of March, 1870, the plaintiff duly tendered to defendant the amount due under the policy, they will find for the plaintiff, in the sum of three thousand dollars, less the amount shown to be due, at the rate of six per cent. per annum from the commencement of this suit, to-wit: 13th Sept. 1870."

There were instructions given and refused for defendant, but it is unnecessary to recite them, as the giving of the plaintiff's instruction raises the only material point in the case.

The jury, under this instruction, found for the plaintiff, the amount of the policy less the amount unpaid on said policy, as indicated in plaintiff's instruction.

A motion for a new trial was overruled and judgment rendered at special term for plaintiff, and the defendant appealed to the General Term where the judgment at Special Term was affirmed, and an appeal taken to this court.

In contracts of insurance, as in other contracts, the parties may make the time of the performance of any stipulation of the very essence of the contract. In such case, the contract becomes utterly at an end, or void, as soon as the default is made. The stipulations in regard to the time of the payment of the premiums in this policy, I do not regard as of the essence of the contract. It was not so regarded by the parties themselves. By their acts and conduct the parties have construed this contract for themselves. It was not regarded by either party as of the essence of this policy, that the premiums should be paid on the very day that they became due.

The memorandum at the foot of the policy did not give any additional force to the stipulation in the policy, if we may consider it as having any effect whatever. If it had any force, it seemed to be looked upon by the parties as a license or invitation to the plaintiff to disregard the exact day of payment and to rely upon the courtesy of the company. The plaintiff pursued this course, and instead of making his payments on the very day when due, let them lie over for a short time, and still they were received without objection.

The plaintiff was thus induced to believe, that a failure of strict payment on the day would not prejudice his rights.

The courts have become more liberal in their construction of those sort of stipulations in policies of insurance ; formerly it was held, that when in a fire insurance policy it was required that additional insurance could not be taken without first obtaining the consent in writing of the company, to be indorsed upon the policy, it would become void if such consent was not in every case so indorsed. It was not sufficient to give notice of the additional insurance and rely upon the company's verbal consent thereto.

The old rule required the consent to be in writing and indorsed upon the policy, but it is now understood to be the settled law of this State, that if notice be given to the company of the additional insurance, and no objection is made, the company will be estopped from insisting on a forfeiture of the policy, because their consent thereto was not indorsed as required by the literal stipulation therein.

So in regard to the payment of premiums, it seems to be well settled that the practice of the company in accepting the same without objection after the day stipulated for the payment, must be treated as a waiver of the exact time as an essential ingredient of the contract. (See *Buckbee vs. U. S. Ins. Co.*, 18 Barbour, 541 ; *Buse vs. Mutual Benefit Life Ins. Co.*, 26 Barbour, 556 ; *Helme vs. Philadelphia Life Ins. Co. Ct., Penn. Stat.*, 107.)

Under this view the judgment must be affirmed. The other judges concur.

Sheffield, et al., v. Balmer, et al.

N. M. SHEFFIELD *et al.*, Appellants, *vs.* CHARLES BALMER
et al., Respondents.

1. *Presumptions—Contracts—Violation of law*—When a contract can be performed without any violation of law, it is the legal presumption that it will be so performed, or at least there is no presumption that it will not be so performed.

Appeal from St. Louis Circuit Court.

Amos M. Thayer, for Appellant.

The contract sued upon did not contemplate the doing of any act prohibited by Section 35, Chap. 206, G. S. 1865.

Horatio D. Wood, for Respondents.

This was a contract for the sale of merchandise on Sunday (Smith vs. Wilcox, 24 N. Y. 353).

VORIES, Judge, delivered the opinion of the court.

This action was brought before a justice of the peace. The action was founded on the following agreement.

"St. Louis, November 24th, 1868. We agree to pay Sheffield, Eaton & Stone, publishers St. Louis *Home Journal*, five dollars per issue for publishing a one hundred (1-3 column) line advertisement for us in their weekly (Sunday) edition every Sunday for one year; said advertisement to be changed at our option.

BALMER & WEBER."

The plaintiffs recovered a judgment before the justice for one hundred and fifty-five dollars; from this judgment defendants appealed to the St. Louis Circuit Court. In the Circuit Court at special term defendants recovered a judgment, and from this last judgment the plaintiffs appealed to the general term where the judgment was affirmed, and the plaintiffs appealed to this court.

It appears from the bill of exceptions, that on the trial before the special term of the circuit court plaintiffs read in evidence the agreement herein before set forth, and then gave oral evidence tending to show; that plaintiffs were partners in business under the name of Sheffield & Stone at the commencement of the suit; that after the contract read in evi-

dence was executed, and prior to the suit, Mr. Eaton sold all his interest in the firm of Sheffield Eaton & Stone to plaintiffs: that the advertisement mentioned in the contract was published for one year from and after November 28th, 1868, in the Sunday edition of the St. Louis *Home Journal*, that (31) publications of said advertisement from and after April 17th, 1869, remained unpaid for, amounting to \$155. The evidence tended to show that the advertisement was paid for up to April 17th, 1869: that at that day plaintiffs were ordered to suspend the advertisement, that sometime prior to April 17th, 1869, defendants had ordered a change to be made in the advertisement, which change plaintiffs did not make for the space of one or two weeks, but afterwards made, and continued to publish the advertisement as changed until the expiration of the year: that at the date of the contract two editions of the *Home Journal* were published, one edition was dated on Sunday, the other on Saturday, that except as to the date, the editions were identical, but each was furnished to a different list of subscribers, that both editions were published on Saturday afternoon, and mailed on that day to subscribers; that copies of the Sunday edition were sold to subscribers on Sunday morning at plaintiffs office. Further proof was offered to prove, that, in January or February 1869, the two editions were consolidated, but the paper retained the same name and appearance, was printed and mailed on the same day as before, and was sold on Sunday morning as before: that the 31 publications sued for were inserted in the consolidated edition, which was dated on Saturday; that plaintiffs failure to make immediate change in the advertisement desired by the defendant, was occasioned by the wood cut furnished by the defendants being too wide for the columns of the paper: that the change was made as soon as the wood cut was cut down to fit the press: that all of the work performed on the paper was done on week days. The evidence also tended to prove; that the plaintiffs were notified to suspend the advertisement shortly after plaintiffs had neglected to make the change in the advertisement as di-

Sheffield, et al., v. Balmer, et al.

rected: that the defendants knew nothing about the consolidation of the Saturday and Sunday editions, until the trial of this case.

The court at the close of the evidence, at the request of the plaintiffs, declared the law to be as follows:

"If the court find from the evidence, that after the consolidation of the two issues of the "Weekly Home Journal" the defendants advertisement was retained and published in such consolidated issue, theretofore known as the Sunday edition, retained the same appearance, character and name, and was mailed to the same subscribers, and sold on the same days as before such consolidation; that is to say, if the court find that the consolidation amounted simply to the consolidation of the two lists of subscribers, and altering the date one day, without changing the name or time of publication of such paper, then such consolidation and publication of the advertisement in such consolidated issue was not a violation of the contract in evidence."

The court at the request of the defendants declared the law to be as follows:

"If the court believe from the evidence, that by the terms of the contract sued upon, the plaintiff agreed to publish advertisement in a newspaper of this state to be issued, sold, or circulated upon Sunday, that the plaintiff is not entitled to recover."

To the giving of this instruction the plaintiffs at the time excepted. The court having found for the defendant, plaintiff in due time filed his motion for a new trial, stating as grounds for said motion, that the court erred in making the declaration of law at the request of the defendant, and in giving judgment for the defendant, and other causes. This motion being overruled, they again excepted, and the cause is here to be reviewed.

It is insisted by the respondent in this court, that the contract sued on is void, being in violation of the 32d and 35th sections of Wagner's Statutes, page 504. It is contended, that by the contract the appellant agrees to violate said statute,

and to do the acts prohibited thereby, and that the same cannot therefore be enforced by the law. There is no doubt but that, if the plaintiff has agreed to do anything by the contract, which is prohibited by the law, and particularly where there is a penalty affixed to the doing of the act, the contract would be void, and no recovery could be had thereon: but the question is, did the contract sued on require or contemplate the doing of an illegal act. The act referred to is as follows, '§ 32. Every person who shall either labor himself, or compel or permit his apprentices or servants or any other person under his charge or control to labor or perform any work, other than the household offices of daily necessity or charity, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor, and fined not exceeding fifty dollars.

§ 35. Every person, who shall expose for sale any goods, wares or merchandise, or shall keep open any ale or porter-house, grocery or tipling shop &c., on the first day of the week, commonly called Sunday, shall on conviction be adjudged guilty of a misdemeanor and find not exceeding fifty dollars."

The contract sued on does not require the plaintiffs, either expressly or by any necessary inference, to violate this statute. It is not required that an hour's work shall be performed on Sunday. The advertisement is required to be published in the weekly (Sunday) edition of the paper every Sunday. Now this may all be done, and the contract be completely performed, without violating the law by performing labor on Sunday in the least degree, and if the contract can be performed without any violation of law, then it is only a natural and legal presumption that it will be so performed, or at least there is no legal presumption that it will not be so performed, and in fact the evidence in this case shows, that the work in getting up, printing, and mailing, of the Sunday edition was always done on Saturday, so that the 32d section of the statute need not be violated by the performance of the contract unless it would be unlawful to place the papers where sub-

scribers could get and read them on Sundays, which I suppose will not be pretended.

But it is contended, that the evidence shows that papers of this edition of the paper were sold on Sunday: and that such sale of the paper at the office of the plaintiffs was in violation of the 35th section of the statute above set forth. I will not stop to inquire, whether such sale of newspapers comes within the prohibitions contained in the statute or not. It is enough for the present purpose to see, that by the terms of the contract no such sale is required by the plaintiffs, or even remotely referred to. No one after looking over this contract will say, that the plaintiffs could not completely perform the contract, on their part, without ever selling a single paper, either on Sunday or any other day: all that is contemplated by the contract is, that the advertisement shall be published in the paper, and sent to the subscribers thereto. From this view of of the case it will be seen, that there is no evidence in the case, upon which any instruction on the subject could be predicated. The contract does not admit of such a construction. The instruction says, that "if the court believes from the evidence, that by the terms of the contract sued on, the plaintiff agreed &c." What evidence the court refers to, by which it is to believe, that the *terms of the contract* are one way or the other, it is difficult to say. Surely the contract itself is the best evidence of its terms, and when we refer to it there is nothing in it to justify such a declaration of law. It seems that the case has been tried on an entire misconstruction of the contract. It is not therefore necessary to notice any further point in the case, but for the reason aforesaid, the judgment ought to be reversed.

Judge Wagner absent, the other judges concurring, the judgment is reversed, and the case remanded.

JOHN P. CAPELLE, Appellant, *vs.* SAMUEL S. BRAINARD, Respondent.

1. *Practice, civil—Supreme Court—Evidence, weight of.*—In a law case, this Court will not decide upon the weight of the evidence, when there was evidence on both sides.

Error to St. Louis Circuit Court.

H. Berry, for Appellant.

Horatio D. Wood, for Respondent.

No question of law having been raised, this case cannot be reviewed by the Supreme Court. (*Wielandy vs. Lemuel*, 47 Mo., 322; *Gradalph vs. Fink*, 47 Mo., 291.)

VORIES, Judge, delivered the opinion of the court.

This suit was brought in the St. Louis Circuit Court, to recover the amount of three judgments, rendered before a Justice of the Peace. The defense was, that the judgments had been paid and satisfied by the defendant. The evidence strongly tended to sustain the defendant's answer. No objections were taken to any of the evidence by the appellant on the trial. The case was tried by the Court by the consent of parties; no instructions were asked, or given. The Court rendered a judgment for the defendant. The appellant appealed to General Term, and from which an appeal was taken to this Court.

The record in this case presents nothing for the consideration of this Court, no exceptions having been saved, on the trial, to the rulings of the Circuit Court; the single exception saved is to the action of the Court in overruling the appellant's motion for a new trial, which can only authorize this Court, under the records in the cause, to decide as to the weight of the evidence given upon the trial of the case in the Circuit Court. This Court has uniformly refused to decide as to the weight of the evidence, where there was evidence on both sides. (*Wielandy vs. Lemuel*, 47 Mo., 322; *Gradalph vs. Fink*, 47 Mo., 291.)

There was evidence in this case, which strongly, if not con-

Washington Mutual Fire Insurance Co., v. St. Mary's Seminary.

clusively, tended to prove the defendant's answer, and the finding was for the defendant, which will not be disturbed by this Court.

The other Judges concurring, the Judgment of the Circuit Court will be affirmed.



**WASHINGTON MUTUAL FIRE INSURANCE COMPANY, Respondent,
vs. ST. MARY'S SEMINARY, Appellant.**

1. *Contracts—Promissory notes—Signature—Descriptio personæ—Ambiguity—Parol evidence.*—If there is any ambiguity in a contract in writing or a promissory note, in the description of the person, parol evidence is admissible to afford an explanation thereof, and to show upon whom the responsibility of the note should rest, and for whose benefit the contract was made; and if a contract and a note refer in their terms to each other, both may be taken together in construing them.
2. *Corporations—Officers—Acts of—Authority presumed.*—The authority of the chief officer of a corporation to perform certain official acts, may be proven by co-temporaneous or subsequent evidence of special authority.
3. *Practice, civil—Trials—Instructions must not assume facts not in evidence.*—Instructions which assume the existence of facts which are not in evidence are improper.

Appeal from St. Louis Circuit Court.

Daniel Dillon, for Appellant.

I. The court erred in admitting the note in evidence. (Wood vs. Goodridge, 6 Cnsh., 122; Smith vs. Alexander, 31 Mo., 194; Musser vs. Johnson, 42 Mo., 78; McClellan vs. Reynolds, 49 Mo., 314; 1 Pars. Notes & Bills, 92-93, and notes *g* and *h*; Moss vs. Livingston, 4 Coms., 208; Taber vs. Cannon, 8 Met., 456; Tucker Man. Co. vs. Fairbanks, 98 Mass., 101; Arnold vs. Sprague, 34 Vt., 402; Titus vs. Kyle, 10 Ohio St., 444; Harkins vs. Edwards, 1 Clarke, (Iowa) 426; Barker vs. Mech. Ins. Co., 3 Wend., 94; Pentz vs. Stanton, 10 Wend., 271; Pumpelly vs. Phelps, 40 N. Y., 59; McClerman vs. Hall, 33 Md., 293.)

II. The court erred in admitting in evidence the policy of

insurance. On its face it purported to insure Mr. Daniel McCarty, President of St. Mary's Seminary, reference being had to his application, and in consideration that the assured had become a member of the company and had bound *himself, his heirs, executors and administrators, &c.*, and had executed to plaintiff a note for \$750, &c.

(a.) This is expressly and emphatically a contract with Daniel McCarty, and to be permitted to show that it was not a contract with him, but with somebody else, would be to allow evidence to directly contradict the express words of the contract. In addition to the cases already referred to, see: *Murphy vs. Price*, 48 Mo., 247; *Solmes vs. The Rutger F. Ins. Co.*, 3 Keyes, 416; *Williams vs. Christie*, 4 Duer., 29; *Newcomb vs. Clarke*, 1 Denio, 226; *Fenley vs. Stewart*, 5 Sandford, 101; *Tanner vs. Christian*, 29 Eng. L. & Eq., 103; *Lenard vs. Robinson*, 32 Eng. L. & Eq., 127.

(b.) This policy is a contract under seal. No person can be held a party to such a contract unless his name is on the face of it as a party thereto. (*Lincoln vs. Crandell*, 21 Wend., 101; *Evans vs. Wells*, 22 Wend., 324; *White vs. Skinner*, 13 Johnson, 307; *Tippetts vs. Walker, et al.*, 4 Mass 595; *Hefernan vs. Adams*, 7 Watts, 121; *Mears vs. Morrison*, 1 Breese, 172; *Sheldon vs. Dunlap*, 1 Harrison, (N. Y.) 245; *Simonds vs. Beauchamp*, 1 Mo., 591.)

(c.) Besides, if the policy was not under seal, the same rules should be applied to it as to sealed instruments. (*Higginson vs. Dall*, 13 Mass. 99; *Jennings vs. Chen. Co. M. Ins. Co.*, 2 Denio, 79.)

If the policy did not insure the defendant there was no consideration for the note, and even if the note be held to be the note of the defendant, it was void for want of consideration.

III. The court erred in giving instructing, No. 1, for plaintiff. In the first place, it makes the recognition of its President, the recognition of defendant, without reference to whether or not he had authority to represent defendant in that matter or not.

In the second place there was no evidence to warrant the

giving of this instruction. There was no evidence of the payment of any money by any one, except by Burke, and it is not contended that he had any authority to pay the money.

IV. The court erred in giving instruction No. 2, for plaintiff. It simply states an abstract proposition of law without any reference to the evidence in the case and should have been refused. (*Huffman vs. Ackley*, 34 Mo., 277.)

V. The court erred in giving instruction No. 1, for defendant. There was no evidence tending to prove that Daniel McCarty had any authority from defendant to effect the insurance or make the note.

The authority of a president, cashier or any other officer of a corporation must be proved like the authority of any other agent. (*First Nat. Bank &c. vs. Hogan*, 47 Mo., 472; *The M. Bk. of the city of N. Y. vs. Clements*, 3 Bosw., 600; *Blood vs. Marcuse*, 38 California, 590; *McCullough vs. Moss*, 5 Denio., 575; *Leavitt vs. The Conn. Peat. Co. (U. S. C. C. Dist. of Conn.,)* 1 Am. Corp. Cases, 113; *Angell and Ames on Corp.* page 298, (8 Ed.,) Sec., 297; *Harwood vs. Humes*, 9 Ala., 659; *Chitty on Bills* 28.)

Besides, if Daniel McCarty had full authority to insure defendant in plaintiff, this of itself would not authorize him to delegate Thomas Burke to effect the insurance. (*Story on Agency* 13; *Chitty on Bills*, 32; *Emerson vs. The Prov. Hat Man. Co.*, 12 Mass., 244; *Brewster vs. Hobart*, 15 Pick., 302; *Wilson vs. Y. & M. L. R. R. Co.*, 11 Gill. & J. 74; *Mason vs. Wait*, 4 Scammon, (5 Ills.,) 127.)

There was no evidence tending to prove a ratification on the part of defendant, or any evidence tending to prove that any person connected with defendant had knowledge of the existence of this insurance, except McCarty. Here, as all the way through the case, plaintiff makes McCarty and defendant one.

Before any action of McCarty tending to prove a ratification, can be evidence against defendant, it must be shown that he had authority to bind defendant in the matters which are claimed to be acts of ratification. There was no evidence that he had authority to represent defendant in anything.

The payment of the money was made by Burke without any authority and it never was assented to. There being no evidence tending to prove authority to Burke to make the note, and no evidence tending to prove a ratification by defendant, the instruction ought to have been given.

W. H. Horner, for Respondent.

I. The policy in the name of "Daniel McCarthy, President of Saint Mary's Seminary," is a policy insuring the appellant, and the note and application signed by him as President, are the note and application of appellant. They need no extraneous evidence to show their meaning. If they did, ambiguities may be explained by parol evidence, and the evidence in this case fully sets forth the intention of the parties. (*Sherman vs. Fitch*, 98 Mass., 59; *Haven vs. Adams*, 4 Allen, 80; *Angell & Ames on Corp.*, (9th ed., 1871) pp. 293-6-7; §§ 293-4 and citations; *Thompson vs. Tioga R. Co.*, 36 Barb. 79; *Bird vs. Daggett*, 97 Mass. 495; *Sharp vs. Bellis*, 61 Penn. State, 59; *Nichols vs. Frothingham*, 45 Maine, 220; *Eastern R. Co. vs. Benedict*, 5 Gray 561; *Com. Bank vs. French*, 21 Pick. 486; *Dispatch Line vs. Bellamy Mf. Co.* 12 N. H., 205; *Mechanics Bank vs. Bank of Columbia*, 5 Wheaton 326; *Smith vs. Alexander*, 31 Mo., 193; *Schuetze vs. Bailey*, 40 Mo., 69; *Musser vs. Johnson*, 42 Mo., 74; *McClellan vs. Reynolds*, 49 Mo. 312.)

II. Upon the face of the policy, note and application they should be construed as the contract of appellant, and any doubt as to their meaning is removed by the circumstances attending their execution. It is admissible to show the intention of the parties by facts surrounding the transaction, and the conduct of the parties; see cases above cited.

III. McCarthy was acting as President openly and under color of office, and there follows from this fact a presumption of a legal holding, and an authority to perform the duties of the office. (*State Bank vs. Bell*, 5 Black., 127; *Union Manufacturing Co. vs. Pilkin*, 14 Conn., 174; *Ang. & Ames on Corp.*, (9th Ed.) sec. 282, p. 277; *Musser vs. Johnson*, 42 Mo. 74.)

Assuming then that President McCarthy was the officer who should represent appellant, the meaning of the instruments offered in evidence, *without regard to extrinsic facts* as a question raised by appellant in the Court below. In discussing this point, the Courts have laid considerable stress upon what they have termed the *official* marks appearing upon the face of the contract. In the application, it purports to be made by D. McCarthy, President of St. Mary's Seminary, and it is for insurance upon building owned by appellant, used for religious and educational purposes. *The note* is attached to the *application*, as a part of it, printed upon the same sheet. These are all indications that the Seminary is to receive the benefit of the contract. The application is by the terms of the policy a part of the policy. The note, policy, and application form parts of one entire contract, when they are referred to in the policy. (*Gahagan vs. U. M. Ins. Co.*, 43 N. H., 176; 27 N. H., 157; 38 N. H., 338.)

IV. But under the law as stated above, the facts attending the execution of the contract leave no room for doubt as to the intention of the parties. It was the appellant's property insured; it was the appellant's money paid by Burke, as first payment upon the note; it was the appellant's chief executive officer who authorized in the first instance, and then ratified and adopted the contract. In case of damage by fire, could it be said, looking at the form of these instruments, in the light of all these circumstances, that the appellant could not recover from appellee the amount of appellant's loss?

V. The strict rules of former times requiring seals and other useless formalities no longer prevail, and contracts of corporations are now formed by the express promises of their agents and officers, or *implied* from their acts, as in case of individuals. (*Angell & Ames on Corp.* (8th Ed.) Sec., 237, p. 212.)

VI. The rule of law is, that a person for whom another has performed some act, as his agent, shall at once upon knowledge of the facts, either ratify or repudiate the acts of the agent. Silent acquiescence is construed as an adoption, and

the principal is not permitted to procrastinate, to partially receive and partially reject the benefits of a contract thus entered into. (Dunlap's Pal. Ag. 324, note; Broom's Legal Maxims, 776; Badger vs. Bank of Com., 26 Maine, 428; Bank of U. S. vs. Dandridge, 12 Wheaton, 64; Finney vs. Fairhaven Ins. Co., 5 Met., 192; Amory vs. Hamilton, 17 Mass., 103; Nesbitt vs. Helser, 49 Mo., 383.)

SHERWOOD, Judge, delivered the opinion of the court.

Action in the St. Louis Circuit Court by the Washington Fire Insurance Company to recover from St. Mary's Seminary a certain sum for assessments made by the former on a premium or deposit note, which the defendant was in the petition charged with having executed. The answer was a general, as well as a very lengthy and specific, denial of each and every allegation which the petition contained. It denied ever having made any application to plaintiff for insurance; denied that any application of defendant to plaintiff for insurance was signed by Daniel McCarthy, President of defendant, per Thomas Burke, the agent of defendant; denied the delivery by plaintiff to defendant of its Policy of Insurance; denied the execution by defendant to plaintiff of its certain premium deposit note mentioned in the petition; denied that any note executed by defendant was filed with the petition; denied that any note executed or delivered by defendant to plaintiff was signed by Daniel McCarthy, President, per Thomas Burke; denied that McCarthy & Burke were authorized agents of the defendant to make any such application or to execute any premium note, &c., &c.

The note mentioned in and filed with the petition is in this form.

"\$750. For value received in Policy No. 2969, dated the fourteenth day of March, 1866, issued by the Washington Mutual Fire Insurance Company of St. Louis, I promise to pay said company (or their Secretary for the time being) the sum of seven hundred and fifty dollars, in such portions and at such

Washington Mutual Fire Insurance Co., v. St. Mary's Seminary.

time or times as the directors of said Company may, agreeably to their Acts of Incorporation, require.

Daniel McCarthy, President,
per Thomas Burke."

and indorsed on said note are these words No. 2969-\$750. Received 10 per centum, \$75, and Received Assessment, No. 5, \$75

The trial was had before the court, a jury being waived.

The application mentioned in and annexed to the petition, was designated in said application as, "Application of Daniel McCarthy, President of St. Mary's Seminary," and was signed in the same manner as the premium note above referred to. The Policy of Insurance was of the same date and number as the note and application (both of which are referred to in the policy), and purports to "Insure Mr. Daniel McCarthy, President of St. Mary's Seminary, against loss or damage by fire to the amount of \$5000, as follows, viz:

On the Brick Seminary Building	\$2500.
" " Stone Church Building	2500.
	<hr/>
	\$5000.

"Situated in Perry County, Missouri, near Perryville; \$22,500 on Seminary, and \$12,500 on Church, insured elsewhere."

The evidence showed, that by the terms of the charter of defendant, it was placed in charge of three officers, "Superior, Assistant Superior, and Procurator," that at the time the note above mentioned was signed by Thomas Burke, Daniel McCarthy was the incumbent of two of those offices; Procurator or Treasurer and Acting Superior or President. And the evidence, although conflicting, tended very strongly to show that Daniel McCarthy, either by acts of antecedent authorization or else of subsequent recognition, had empowered Burke to make the application for insurance, sign the note in the way it was signed, procure and transmit the policy and pay assessments.

Defendant objected to the introduction of both the note and policy in evidence, on the ground that the former was not and

did not purport to be the note of the defendant, and that the latter was not, and did not purport to be, a policy issued to or insuring defendant. The court allowed both note and policy to be read in evidence, and defendant excepted.

The court at the instance of plaintiff gave the following instructions:

1. "If the Court believes from the evidence, that defendant through its President or Superior recognized the note sued on as the note of the defendant, by paying a portion thereof after demand upon defendant by notice to President or Superior, and that a portion of said note is now due, the court will find for plaintiff.

2. The court declares the law to be, that the act of a person for another acting as his agent may be valid and binding upon the principal, on account of the ratification or adoption of the agent's acts after knowledge by the principal of what the person acting as agent has done. A subsequent ratification has a retrospective effect and is equivalent to a prior command."

And at defendant's request gave instructions as follows:

1. "The court declares the law to be, that Daniel McCarthy had no authority to bind defendant by the Contract of Insurance offered in evidence, or the note sued on, from the fact that he held the office of President of defendant; and plaintiff, in order to recover in this action, must prove that said McCarthy had authority from defendant to execute said note, by evidence other than that the said McCarthy held said office of President of defendant.

2. "The court declares the law to be, that any instructions given by Stephen Ryan to Father Burke in reference to effecting insurance are not binding upon defendant.

3. "The court declares the law to be, that if Thomas Burke, at the time he made the contract of insurance given in evidence and executed the note sued on, acted as the agent of Daniel McCarthy, and not as the agent of the defendant, then no subsequent action of defendant could ratify said contract or the execution of said note, or make them binding upon defendant."

4. "The court declares the law to be, that the fact that Daniel McCarthy had authority to bind defendant by a contract of insurance, such a note as the one sued on, did not authorize him to delegate that authority to Thomas Burke; and plaintiff to recover in this action must prove by evidence other than the fact, that he himself possessed such authority, the power of said McCarthy to delegate said authority to said Burke."

And these instructions the court refused, viz:

1. "The court declares the law to be that on the evidence plaintiff cannot recover.

2. "The court declares the law to be, that a simple authority from defendant to Daniel McCarthy to effect insurance for defendant, would not authorize said McCarthy to bind defendant by the contract of insurance given in evidence, or to the note sued on, and plaintiff in order to recover, must prove special authority to make such a contract of insurance, and to give such a note, or a ratification of said contract, and of the execution of said note by defendant."

3. The court declares the law to be, that the paying of premium money on the policy given in evidence, and of assessments on the note given in evidence, out of money in his hands belonging to defendant by Thomas Burke without authority so to do, and which payments defendant never assented to, was not a ratification by defendant of the contract of insurance read in evidence, or of the execution of said note, notwithstanding defendant accepted said Burke's account with defendant, crediting himself with money so paid, and took no steps to recover such money."

4. The court declares the law to be, that the law does not authorize, and had not at any time authorized, any such officer of defendant as President, and no action of any person pretending to be such officer is binding upon defendant in consequence of his assuming to act as such officer.

Defendant excepted to the giving of the instructions for plaintiff, and to the refusal of the court to give the last series of instructions asked by defendant. Judgment was rendered for plaintiff, and after unsuccessful motions for new trial and

Washington Mutual Fire Insurance Co., v. St. Mary's Seminary.

in arrest, the cause was taken to the general term, where the judgment of special term being affirmed, the case comes here by appeal.

If there was any ambiguity in either the note or the policy of insurance, parol evidence was perfectly admissible for the purpose of affording an explanation thereof, and of showing upon whom the liability, arising from the execution of the note, should rest, and for whose benefit the policy was designed to insure.

In *Mechanics' Bank of Alexandria vs. Bank of Columbia*, 5 Wheat., 327, which was an action of assumpsit on the following check:

"Mechanics' Bank of Alexandria, June 25, 1817.

Cashier of the Bank of Columbus pay to the order of P. H. Minor, Esq., ten thousand dollars.

Wm. Patton, Jr."

The court says "It is by no means true, as was contended in argument, that the acts of agents derive their validity *from professing on the face of them* to have been done in the exercise of their agency. In the more solemn exercise of derivative power, as applied to the execution of instruments known to the common law, rules of form have been prescribed. But in the diversified exercise of the duties of a general agent, the liability of the principal depends upon the facts; first that the act was done in the exercise, and second within the limits of the powers delegated. These facts are necessarily inquirable into by a court and jury; and this inquiry is not confined to written instruments (to which alone the principal contended for could apply) but to any act with or without writing within the scope of the power or confidence reposed in the agent." In that case it was contended that, as the check on its face purported to be the private check of Patton, no extrinsic evidence could be received to prove the contrary. And in reference to that the court further says: "The only ground, upon which it can be contended that this check was a private check, is that it had not below the name the letters "Cas." or "Ca." But the fallacy of the proposition will at once appear from the

consideration that the consequences would be that all of Patton's checks must have been adjudged private. For no definite meaning could be attached to the addition of these letters without the aid of parol testimony."

The case of the Commercial Bank vs. French, 21 Pick. 486, was a suit upon a note, made payable to the "Cashier of the Commercial Bank," and it was contended that the suit should have been brought in the names of the person then Cashier, and would not lie in the name of the Corporation. But the Court there say: "So a contract with the stock-holders, or with the President and Directors, or with the Directors of the Commercial Bank, would doubtless be in its legal effects a contract with the corporation. It is not easy to perceive why a contract with the Cashier of a Bank is not a contract with the Bank itself. * * * * * The principle is that the promise must be understood according to the intention of the parties. If in truth it be an undertaking to the Corporation, whether a right or a wrong name, whether the name of the corporation or of some of its officers be used, it should be declared on and treated as a promise to the Corporation."

The above cases are in full accord with the decisions of our own State, that of Mechanics Bank vs. Bank of Columbia, 5 Wheat., 327, being cited with approval by Judge Ewing in Smith vs. Alexander, 31 Mo., 193; See also to the same effect Schultze vs. Bailey, 40 Mo., 69; Musser vs. Johnson, 42 Mo., 74; McClellan vs. Reynolds, 49 Mo. 321.

In the present case the note sued on is signed "Daniel McCarthy Prest." But president of what? Just here, under the rules laid down in the above cited cases, parol evidence steps in and affords a ready and satisfactory explanation. The abbreviated word Prest. attached to the name of Daniel McCarthy is an ear mark of the official capacity in which the note was signed—not evidence, it is true, that the note was signed in that capacity, but a sufficient basis for the introduction of testimony tending to establish that fact.

I have hitherto treated this case just as if the note sued on were standing alone; and explanatory oral evidence was offered in regard to the above alluded to abbreviation.

But this record presents a far stronger case than if the note stood by itself. Here the note is numbered 2969, so is the policy, and both are of even date. The note says "For value received in Policy No., 2969," and the policy recites the execution of the note "for the sum of seven hundred and fifty dollars, being the amount of deposit or premium for insurance as above said," thus keeping up as it were between the policy and the note a reciprocal cross fire of reference; and establishing beyond peradventure the design with which the note was executed, on whom the burden of its payment was intended to be cast, and for whose benefit the policy was meant to inure. To all intents and purposes, therefore, the result is precisely the same as if note, policy, and application were all written upon one and the same sheet of paper. To hold otherwise would be to entirely ignore the familiar rule, always applicable where one instrument makes reference to another.

McCarthy's authority to act in the premises is to be presumed from the high official positions which he held—being, as the evidence shows, at the time of the transaction put in issue by the pleadings, Superior or President and Procurator or Treasurer of defendant—from the fact the policy of Insurance was sent to him, from the fact that after notice of an assessment was sent to him at Perryville as President of defendant, that response was made through Burke, and the assessment paid; from the fact that McCarthy had in his possession the policy in question, together with others purporting to have been made in the same way and at the same time, and "authorized" a lawyer whom he consulted for the purpose "if they were not legal to have them made legal"; from the fact that Burke, the former Procurator or Treasurer of defendant, out of the money in his hands paid to him by the patrons of defendant, had made disbursements for assessments and sent memoranda thereof to McCarthy once or twice a year for several years, as McCarthy himself swears. These facts, and many others of like sort pointing in the same direction, leave no doubt in the mind that Burke, either by prior

appointment or subsequent sanction from McCarthy, was fully empowered to give the note and effect the insurance for the defendant which gave rise to the suit, and that McCarthy had full power to authorize Burke to act as he did. No proof of any special authority was required.

The doctrine has been long since justly exploded, that every act to be performed by the agent of a Corporation has to be authenticated by its Corporate Seal.

Thus in the "Union Manufacturing Company vs. Petken, 14 Conn., 174, speaking with reference to this point, the Court say :

"But it is said that no act or vote of the corporation is shown ; nor is there any witness to the fact that this was done by the Corporation, or by its authority. It is now quite too late to question the acts of a corporation because a vote and seal are not shown, since the decisions in our own Courts and the Courts of the United States " (See also *Western Bank of Mo., vs. Gilstrap*, 45 Mo., 419.) It is the merest play upon words, to assert, as was done in one of the refused declarations of law asked by appellant, that "the law did not authorize any such officer of defendant as President."

The testimony of McCarthy himself shows, that the term Superior was tantamount to that of President and meant the same thing.

Once establish the fact, as the evidence amply does in this case, that a given person holds certain high official relations towards a Corporation, and is in the active exercise of powers for a series of years, and engaged in the performance of duties usually incident to such official position, and it matters little whether he is called Superior or President.

The first, second, and fourth declarations of law, which the Court refused to give for defendant, were properly refused as shown above. The defendant's third declaration was properly refused also, as it assumed the existence of two facts ; first, that Burke made the payments "without authority so to do," and second, that defendant "never assented to" such payments.

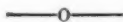
There are also minor exceptions in this record which have

Neef v. Maguire.

either been incidentally passed upon in the foregoing remarks, or which, although considered, are not regarded as possessing sufficient practical importance to merit specific mention.

As the result of the views herein expressed, there is no error in the record and the Judgment will accordingly be affirmed.

Judge Wagner absent. The other Judges concur.



CHRISTIAN NEEF, Respondent, *vs.* CONSTANTINE MAGUIRE, Appellant.

1. *Statutes, construction of—Legislature—When statute takes effect.*—The statute (2 W. S., 894, § 4,) declaring that acts of the Legislature shall not take effect till ninety days after passage, unless a different time is appointed by the act, is valid, and is no restriction on the power of the Legislature.
2. *Statutes—Licenses—Courts, County, orders of—Validity of, if made before statute authorizing goes into effect.*—An order of a County Court requiring licenses and assessing a tax therefor, made before the statute authorizing such order goes into effect, is null and void.

Appeal from St. Louis Circuit Court.

Thos. C. Reynolds, for Appellant.

One legislature cannot bind or restrict another in the power of legislation, and according to established rules of construction of statutes, a law goes into effect on its passage, unless otherwise ordered in the law itself.

The orders of County Courts are not to be construed with critical nicety.

The collector is protected in his seizure by the order of the County Court of April 21st, 1870, because at the time of his seizure, the pigeon-hole table was subject to taxation by the County Court, and such an order, regular on its face, had for him the force of an execution. (*State, use of Pacific Railroad, vs. Dulle*, 48 Mo., 287; *North Missouri Railroad Company vs. Maguire*, 49 Mo., 490.)

F. & L. Gottschalk, for Respondent.

All acts of the General Assembly take effect at the end of ninety days after their passage, unless a different time is mentioned in the act. (W. S., 894, § 4.)

The order of the County Court is void, being made before the law went into effect. A collector is liable for levying upon property for taxes illegally assessed, or if the property be not subject to taxation. (*State vs. Shaklett*, 37 Mo., 280; *McPike vs. Pew*, 48 Mo., 525.)

VORIES, Judge, delivered the opinion of the court.

This action was brought by the respondent against the appellant, before a Justice of the Peace to recover one hundred dollars, the value of a pigeon-hole table, which it was charged that the appellant had unlawfully taken from the respondent and converted to his own use. The plaintiff recovered judgment before the justice for the sum of one hundred dollars. The defendant appealed to the St. Louis Circuit Court, where at special term the plaintiff again recovered a judgment. The defendant appealed to the General Term, when the judgment rendered at Special Term was affirmed, from which judgment the defendant appealed to this court.

The bill of exceptions shows, that the cause was tried at the Special Term of the Circuit Court before the court without a jury, on the following evidence and statement of facts, as agreed to by the respective attorneys in the cause to-wit: "Plaintiff before and at the time of and since the seizure of the pigeon hole table is, and was the owner thereof; that the same is and was of the value of one hundred dollars. Plaintiff, on and before the seizure had the same set up in a public house or bar-room kept by him, and permitted the same to be used in St. Louis County by players, using the same for the purpose of determining who should pay for beer at plaintiff's bar. Defendant is the collector of revenue for St. Louis County, and was such collector at the time of the seizing of said table. That plaintiff being owner and keeper of said table, did fail and refuse to pay the defendant the amount of license on said table, within ten days after the same was set up, although the same was de-

demand of him; that defendant as such collector, on the day of the seizure levied upon and seized and carried away such table, more than ten days after the same was set up, for the non-payment of the license claimed by defendant to be due and payable by plaintiff for said pigeon hole table; that plaintiff never paid any license for said table, and that the County Court of St. Louis County made an order fixing the license for such pigeon hole table at a certain sum on the — day of April 1870," which order is made a part of the record and is, as follows:

"In the County Court of St. Louis County, Thursday, April 21st, 1870. Ordered by the court, that an annual license tax of five dollars be and the same is hereby levied for county purposes upon every pigeon hole table and Jenny Lind table, upon which a tax is collected for State purposes."

After judgment was rendered in the special term of the Circuit Court, the defendant filed his motion for a new trial, for the reason that the judgment was for the wrong party, and was against law and evidence; the motion was overruled by the court, and the defendant excepted. The defendant also excepted to the opinion of the Circuit Court at the General Term in affirming the judgment of the Special Term.

The question raised by the parties in this case is, that the General Assembly on the 24th of March, 1870, enacted a law by which County Courts were empowered to license the keepers of "billiard tables, pigeon hole tables, Jenny Lind tables, &c," kept for gaming upon, with ball and cues; that at each term of said courts the clerks should prepare and deliver to the collectors of their counties, blank licenses for the keepers of such tables, &c., to be delivered to such keepers by the collector, &c.; that no greater tax should be levied, on any of the tables mentioned, by the counties for county purposes, than is allowed on the same for State purposes; that the county should have a lien on such tables for the amount of the license levied. There was no law authorizing County Courts to tax or license pigeon hole tables until the passage of the act. The Legislature failed to specify in said act any time for the taking effect

thereof, but the time at which the law should take effect, was left to the general statute on that subject. The County Court of St. Louis County on the 21st day of April, 1870, made an order levying a tax of five dollars on pigeon hole tables and Jenny Lind tables. It was under this order levying a tax on these tables as aforesaid, that the defendant, in July 1870, seized and took plaintiff's table.

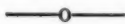
The first question presented is, when did the act of the Legislature before referred to, take effect? It is provided by the statute of the State, that "All Acts of the General Assembly shall take effect at the end of ninety days after the passage thereof, unless a different time is therein appointed." (2 W. S., 894, § 4.)

The Act before referred to, not having a different time appointed therein, would take effect at the end of ninety days after its passage. The statute then, under which this tax or license was levied, would take effect on the 24th day of June, 1870. It is however contended on the part of the defendant, that according to established rules of construction, a statute of law takes effect from its passage, and that one Legislature cannot bind or restrict another in the powers of Legislation. The answer to this is, that in saying that laws shall take effect at the end of ninety days after their passage, when no time is fixed for the taking effect of said Act, is not an attempt to restrict the powers of Legislation, it is only an attempt to fix the time that the law shall take effect, when no time is named therein, leaving to every future Legislature the full right to fix any other time, if it should be deemed proper. As no different time is fixed in the Act, under which the defendant attempts to justify the taking of the plaintiff's table, it follows that the Act had no more effect until the end of ninety days, than if it had never been passed. The order of the County Court, therefore, made before the taking effect of the law under which it was attempted to be made, attempting to levy a tax or license on pigeon hole table, &c., was wholly without authority and void, and would not justify the defendant in seizing and taking away the plaintiff's table. (State vs. Shack-

 Butler, Administrator, v. Manny.

lett, 37 Mo., 280 ; *McPike vs. Pew, et al.*, 48 Mo., 525.) In fact, if the law had taken effect from its passage, there is not enough appearing upon the record in this case, to show any jurisdiction on the part of the defendant for seizing the property, but I have considered the case as the same is presented by the appellant in his brief.

The other Judges concurring, the judgment of the Circuit Court at General Term is affirmed.



WILLIAM C. BUTLER, Administrator of ELIZA BUTLER, deceased, *et al.*, Respondent, *vs.* EDMUND A. MANNY, Appellant.

1. *Contracts—Covenants, dependent—Consideration.*—Covenants in a contract are dependent, which are mutual and go to the entire consideration.

Appeal from St. Louis Circuit Court.

S. Knox, and A. M. Gardner, for Appellant.

1. Plaintiffs had no right to claim a renewal except of the whole leasehold property described in their lease. Unless they did claim such renewal, they had no claim for the value of the buildings, nor, under the provisions of the lease, was there any valuation of the buildings to be made, until the expiration of the renewal term. (*Taylor on Landlord & Tenant*, § 335, 4th Edition ; 6 John. Ch. R., 215 ; *Pearce vs. Colden*, 8 Barb. 522 ; *Pike vs. Butler*, 4 Barb. 3.)

2. Neither law or equity will give relief where there have been breaches on part of lessee. (*City of London vs. Mitford*, 14 Vesey Jr. 40 ; *Maxwell vs. Ward*, 1 McCld., 464 ; *Eaton vs. Lyon*, 3 Vesey Jr., 690.)

Lackland, Martin & Lackland, for Respondents.

“Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may

Butler, Administrator, v. Manny.

be maintained for a breach of the covenant by the defendant, without averring performance in the declaration." (*Pordage vs. Cole*, 1 Saunders, 320, n. 4, [5th Am. Ed.]; *Boone vs. Eyre*, 1 H. Black, 273, note [a.]; *Duke St. Albans vs. Shore*, 1 H. Black, 270; *Campbell vs. Jones*, 6 T. R. 570.)

2. A covenant of renewal is a covenant on the part of the landlord. [Taylor's L. and T., 233.] It is a privilege in the hands of the tenant.

VORIES, Judge, delivered the opinion of the court.

The petition in this case shows the following state of facts as a cause of action: That in December 1851, Frederick W. Beckwith, Tullia C. Beckwith, Amedee Valle and Lewis C. Smith, as trustees of the said Tullia C. Beckwith, by their deed of lease demised a certain lot in St. Louis, being 69 feet, 3 inches by 127 feet six inches, to James T. Pettus for the term of ten years from the first day of January 1852.

That afterwards on the first day of April 1853, the said James T. Pettus transferred to Henry M. Dedman, trustee of Martha Butler, for her sole use and benefit, by deed of that date, 42 feet by 69 feet of ground, being part of the lot first above demised, and that the said Martha Butler then became the lessee, &c., that afterwards the said Pettus by deed, dated December 1st, 1853, conveyed and transferred to defendant Edward Manny all of his right and title and leasehold estate in and to the land and lots named in the said first named lease to said Pettus, as is above stated, and that the said Martha Butler attorned to and became the tenant of said Manny under the transfer or lease made to her by said Pettus: That afterwards the said Martha Butler and her trustee Henry M. Dedman, conveyed and assigned by deed, dated 25th Sept. 1856, to Julia Butler, Eliza Butler, and Mary M. Dedman, formerly Mary A. Butler, daughter of Martha Butler, all their right and interest in and to the said lot or parcel of land before conveyed or assigned to them by said James T. Pettus as aforesaid, and that the said grantees of the said Martha Butler and her trustee, became the tenants of the said defendant Manny. That said lease or demise, by which said grantees or

lessees Julia and Eliza Butler and Mary M. Dedman held, was for the term of nine years from and after the first day of January, 1853.

That by the terms of the lease of said Pettus to Dedman, trustee of Martha Butler, it was expressly covenanted and agreed, that all the agreements and covenants specified in the said lease from the trustee of Tullia C. Beckwith to said Pettus first above stated, said Pettus bound himself and his heirs to do and perform, and that one of said covenants was that all the agreements, stipulations and covenants of said lease of Tullia C. Beckwith's trustee to said Pettus being fully kept and performed during the term therein named and the renewed term, that he the said Pettus, his heirs, or assigns, would pay to said Dedman, trustee of Martha Butler, and her assigns, the value of the permanent improvements on said lot conveyed in the lease by said Pettus to Dedman, trustee of Martha Butler, the value of said improvements to be determined by two disinterested house holders of the city of St. Louis, one to be chosen by Pettus or his assigns, and the other by said Martha Butler or assigns, and in case of disagreement they were to call in a third person, and the award of any two was to be final, and that by said assignment or conveyance of said Pettus to said defendant Manny, on the first day of December, 1853, said Manny became a party to all of the agreements and covenants contained in said lease of Tullia C. Beckwith's trustee to said Pettus of December 13th, 1851, and agreed thereby to pay said Martha Butler and assigns for said permanent improvements referred to according to the covenants of said lease. That at the date of the expiration of said lease, the first of January 1862, said permanent improvements consisted of a brick house and out houses of the value of three thousand dollars.

That after the termination of the first lease for ten years, said Mary M. Dedman for herself and co-tenants proposed to said Manny, their landlord, to select a disinterested householder of the city of St. Louis, and requested said Manny to select one on his part, to value the improvements as is provided in the lease, but that he refused so to do.

That plaintiffs have performed all covenants and agreements in said lease on their part; that defendant has refused to pay plaintiffs for their interest in said improvements; that defendant has been in possession of said premises and improvements for about eight years.

That in March 1863, Eliza Butler died childless, never having been married, and having no parents living, and that her third interest in the leased premises thereby vested in Julia Butler, Wallace C. Butler, Mary M. Dedman, and the heirs of Adaline Samuels, who was a sister of Eliza Butler and had children living at her death: that Mary M. Dedman in March, 1863, sold to defendant all her interest in said improvements for a valuable consideration, which interest was one-third part of the same.

That the remaining two-thirds of said buildings, or the interest therein, belongs to plaintiffs in equal parts, that defendant has failed and still refuses to pay plaintiffs the same.

That the remaining two-thirds of said buildings, or the interest therein, belongs to plaintiffs in equal parts, that defendant has failed and still refuses to pay plaintiffs for the same:

That the said Wallace Butler is the rightful administrator of the estate of said Eliza Butler deceased. Plaintiffs pray judgment for \$2,000, that being two-thirds of the value of the improvements.

The answer of the defendant denies that Mary M. Dedman for herself and co-tenants requested defendant to select disinterested householders to value said improvements, as charged, or that the lease contained any covenants under which defendant was required at the time named to make any such selection or valuation, or that any valuation was then required to be made; denies that the lessees or plaintiffs have complied with or performed the agreements contained in the lease by them to be performed, and charges that they have utterly failed so to do:

That in the lease from Mrs. Beckwith's Trustee to Pettus and from Pettus to Martha Butler's Trustee it was covenanted, that the said Martha or her assigns, should pay to the lessor or

his representatives the annual rent of \$86, payable semi-annually on the first days of July and January, and pay all taxes, &c., and also give said lessor or his representatives three months notice in writing of their intention to renew said lease, before the first day of January 1862, all of which covenants said lessees and plaintiffs failed to perform :

That at the time last aforesaid there was due defendant for rent \$86, also the sum of \$23.35 for State and County taxes for 1861. That defendant offered to renew said lease, which the lessees and plaintiffs refused, but abandoned the premises at the end of ten years, and suffered the improvements to decay and waste, by which defendant was damaged, &c.:

That in consequence of the failure on the part of the lessees and plaintiffs to perform said lease, they lost all rights to pay for said improvements :

That in January 1863, long after plaintiffs had abandoned the premises, at the request of Mary Dedman acting for herself and co-tenants in the presence of Julia A. Butler, one of the plaintiffs, defendant paid her the sum of \$800 in full satisfaction for any and all claims she or they might have in said premises or improvements, since which time he has been in the quiet possession thereof, plaintiffs making no claim thereto until the commencement of this suit.

The answer also avers, that defendant has fully complied with the covenants of the original lease, &c.

A replication was filed to the answer.

At the trial a jury was waived, and the case tried by the Court.

The original lease from the Trustees of Tullia C. Beckwith to James L. Pettus was first read in evidence. This lease was dated December 13th, 1851, and demised the premises named to the said Pettus for the term of ten years from the first day of January 1852, for the annual rent of \$346.25 payable on the first days of July and January of each year ; it was further provided by the lease, that, if the rents were not paid, &c., the lease could be forfeited at the option of the lessor. Said lease also contains the following covenants.—“And the

Butler, Administrator, v. Manny.

said parties of the first part for themselves their heirs and assigns, covenant with the said party of the second part his executors, administrators and assigns, that all the covenants and stipulations of this lease being fully kept and performed by said party of the second part and his assigns, that they will renew this lease for another period of ten years, upon being notified in writing three months before the expiration of the term herein demised, and upon such renewal an annual rent to be reserved of six per centum upon the valuation of said lot, payable in semi-annual instalments upon the same days as provided in this lease. The valuation to be determined by two disinterested householders of the City of St. Louis, one to be selected by the parties of the first part their heirs or assigns, and the other to be selected by the party of the second part his representatives or assigns, and if the persons thus selected cannot agree they shall call in a third householder, the award of any two to be final and binding, &c.;" said lease also contains the further covenants, as follows: "The said parties of the first part covenant that all the agreements, stipulations and covenants of this lease being fully kept and performed during this term and the renewed term, that they, their heirs and assigns will pay to the said party of the second part his representatives or assigns, the value of the permanent improvements on said premises, the value of said improvements to be determined by persons selected in the manner above prescribed, and the said party of the second part or his assigns may remain in possession of said premises and may receive the rents and profits of the same, until the sum thus found to be due shall be fully paid."

Plaintiff next read in evidence the lease from Pettus to Martha Butler's trustee, (for a part of the same lots) for nine years, from January 1st, 1853, at a ground rent of \$86, payable semi-annually, and taxes, subject to all of the covenants in the former lease, Plaintiff next read in evidence the conveyance and assignment of Pettus to Manny, dated December 1st, 1853, by which all of his estate and leasehold in the premises is conveyed to Manny.

Butler, Administrator, v. Manny.

Next, deed from Martha Butler's trustee to Julia A. Butler, *et al.* The plaintiffs also gave oral evidence, which tended to prove the allegations of the petition, and the value of the improvements, and which tended to prove that all of the taxes and rents had been punctually paid when they fell due. The defendant gave evidence which tended to prove, that the rents were almost always paid to plaintiffs by Mrs. Dedman, occasionally it would be paid by her sister; that the tax bill for 1861 of \$23.35, was not paid by the lessees, but by defendant, and that part of the rent had not been paid by Mrs. Dedman.

The defendant testified, that in 1861 he urged Mrs. Dedman to have the lease renewed; that he never heard of an offer to have appraisers appointed to estimate the value of improvements by Mrs. Dedman in 1862; that in 1862, Mrs. Dedman and her sister came together to defendant's store, and wanted defendant to buy the house, Mrs. Dedman saying that she and her sister had made up their minds to sell, that she was agent for all of them; she proposed to sell the whole house; that he paid them \$800 for the house, all that it was worth at that time, that kind of property at that time had a mere nominal value, &c. He also took a receipt for the eight hundred dollars, which was read in evidence, as follows: "St. Louis, January 30th, 1873. Received of E. A. Manny, eight hundred dollars, in full payment for the house on Chouteau Avenue, bought by our late father, Mann Butler, of James L. Pettus, and which is on the south side of Chouteau Avenue, the third door west of the corner of Seventh, possession given immediately.

Mary M. Dedman."

At the close of the evidence, the court at the request of the plaintiff, declared the law as follows: "The covenants in the pleadings and lease to pay taxes is not such a condition precedent to the plaintiff's right of recovery on the covenant to pay for the improvements, as that a failure to pay the State and County taxes of 1861 can defeat the right of action for the improvements." "Unless Mrs. Dedman had authority

Butler, Administrator, v. Manny.

from Miss Julia A. Butler, and from the administrator of Eliza Butler, to sell their interest in said improvements, then the sale by her is void as to said parties, and could not carry any other interest than her own."

"Under the evidence there never was any forfeiture of the plaintiff's lease."

To the giving of these instructions, defendant objected and excepted. The court, at the instance of the defendant, declared the law to be: "If the court find from the evidence that Mrs. Dedman, acting with the knowledge, consent or approbation of those claiming an interest in the buildings in question, applied to the defendant to sell the interest of the legal representatives of Martha Butler; that under the above circumstances, the defendant supposing and believing that whatever interest the legal representatives of the said Martha Butler had, was purchased in the payment of said sum of eight hundred dollars, and said money was paid for said interest, then the plaintiffs are not entitled to recover in this action."

2nd. "The plaintiffs can only recover in this case for their interest in the buildings on the leasehold property claimed by them; the value of the building is to be taken at its worth in January, 1862."

3rd. "If Julia Butler was present when defendant paid the sum of eight hundred dollars to Mrs. Dedman, said money being understood by the parties there present to be paid for the interest of the legal representatives of Mrs. Martha Butler in the buildings in question, and when said money was so received by said Martha, she paid a portion of the money to said Julia, as a portion of her (said Julia's) interest in said money, then said Julia cannot recover in this case."

The court refused the following declarations of law asked for by defendant, and he excepted: "Unless the court find from the evidence, that the plaintiffs had on the first day of January, 1862, complied with all the covenants, stipulations and agreements which are contained in the lease under which they claim, and with which they had agreed to comply, then the plaintiffs are not entitled to recover in this case."

2nd. "If the court find from the evidence, that the plaintiffs, or those under whom plaintiffs claim, refused to renew the lease in question, the term of which expired January 1st, 1862, then the plaintiffs cannot recover in this case."

3rd. "By the terms of the lease read in evidence by the plaintiffs, the plaintiffs have no right to recover for the value of the buildings thereon, before January 1872."

4th. "If the court find from the evidence, that the plaintiffs claim the right to recover in this action under a certain lease, dated December, 1851, wherein it is provided, that by giving three months notice of a desire to renew said lease, the same should be renewed for ten years after the expiration of the first term of ten years, then the plaintiffs are not entitled to recover in this case, unless, in conformity with the terms of said lease providing for a renewal, the three months notice there required was given, as is provided for in said lease."

The court found for the plaintiffs, and rendered a judgment in their favor for the sum of \$1,500. The defendant then filed a motion for a new trial, and set forth as grounds therefor, amongst other things, the opinions of the court excepted to, and because the judgment is against law and evidence. This motion being overruled, the defendant again excepted, and appealed to General Term of said Court, where the judgment was affirmed, and defendant has appealed to this court.

So far as the facts in this case are concerned, they have been passed upon by the court that tried the cause, and will therefore not be examined here. The questions submitted for the consideration of this court grow out of the giving of instructions or declarations of law, by the court, asked for by the plaintiffs, and objected to by the defendant, and the refusal of the court to declare the law as requested by the defendant, and these questions depend on a proper construction of the lease first read in evidence. It is contended by the defendant, that the covenant to pay rent and taxes on the part of the lessee, and the covenant to pay for the permanent improvements at the expiration of the lease, were mutual dependent covenants, and that if any part of the rent or taxes

Butler, Administrator, v. Manny.

remained unpaid at the expiration of the lease, that the lessees could not recover for said improvements, By the terms of the lease, the lessee agrees to pay the rent semi-annually for ten years, to be paid on the first day of July and January of each year, and he also agrees to pay the taxes and assessments, but no time is fixed by the lease for the payment of the taxes, it is therefore left to the presumption, that they will be paid as they become due; these covenants do not depend at all upon the covenant of the lessor to pay for the improvements after the lease has expired, but they are necessarily independent of such covenants, and may be sued on when broken, without any reference to the performance by the lessor of his covenants to pay for the improvements at the expiration of the term; and again, these covenants to pay the rents by instalments and to pay taxes, each only goes to a part of the consideration of the performance of the contract on the part of the lessor, and cannot therefore be mutually dependent covenants; covenants to be dependent must be mutual, and go to the entire consideration. (Smith vs. Busby, 15 Mo. 387; Bennett vs. Pixley, 7 John., 249; 1 Saunders, 320; 20 John., 15; 15 Pick., 546.) The mere recital in the lease, that the agreements in the lease to be performed by the lessees being performed, the lessor will at the expiration of the lease pay for the improvements, &c., does not have the effect to make independent covenants in the lease, dependent; these covenants, if violated at any time, can be sued on, and their violation compensated for in damages, and the lessor has expressly provided in the lease for the securing of the performance of these covenants, by providing that if the rent remains unpaid for sixty days he may exact double rent, or that if either the rent or the taxes shall remain unpaid, the lessor at his option may forfeit the lease. These provisions show that the covenants to pay rent and taxes are independent of the covenant to pay for the improvements at the termination of the lease. But it is contended by the defendant, that the terms of the lease required the lessees, before they could recover pay for their improvements, to renew the lease at the

expiration of the first term of ten years. If the defendant is correct in this construction of the lease, then of course the instructions refused by the court ought to have been given, and the judgment ought to be reversed.

The language of that part of the lease relied on for this construction, is this: "The said parties of the first part, covenant that all agreements, stipulations and covenants of this lease, being fully kept and performed during this term, *and the renewed term*, they, their heirs and assigns will pay to the said party of the second part, &c."

Now it is contended that there is no promise to pay, unless the lessees renew the lease, and that no action can be brought to recover for the permanent improvements before 1872. It will be recollected, that it was provided by a former clause of the lease, that all covenants, &c. being performed by the lessee or his assigns, the lessor will renew the lease for another period of ten years, upon being notified in writing three months before *expiration of the time herein demised*. It will be seen by this that the lessee made no agreement to renew the lease, or to accept a renewal thereof, but the lessors covenanted that they would renew the lease, provided that they got three months' notice in writing of the lessee's desire to have it renewed. It was a privilege that was given to the lessee to have the lease renewed, if he gave the required notice. If we construe these two clauses together, we find their evident meaning to be, that the covenants of the lease being kept for this term, and the renewed term (if the term is renewed,) the lessors, their heirs and assigns will pay, &c. The lessee was not bound to take a renewal of the lease if he did not wish so to do, and gave up the premises at the expiration of the time for which it was leased. He, by a fair construction of the lease, was entitled to receive pay for the improvements. We think that the words "*if the term is renewed*" are just as well implied after the words "*renewed term*," as if they had been written in the lease. These questions being the only ones discussed or relied on by the appellant, and believing that the court that tried the cause construed the lease

State, ex rel., v. Clark State Auditor.

correctly, and properly refused the instruction refused, and that the instructions given were proper, the judgment ought to be affirmed.

Judge Wagner absent. The other Judges concurring, the judgment is affirmed.

—o—

STATE OF MISSOURI, *ex rel.* JAMES H. VAIL, Relator, *vs.*
GEORGE B. CLARK, STATE AUDITOR, Respondent.

1. *Statute, construction of—Quo Warranto—Attorney General, information by—Act of Feb. 21, 1873.*—The act of Feb. 21, 1873, prohibiting the drawing or paying of a warrant for the salary attached to a State office, when said office is contested or disputed by two or more persons claiming title thereto, or by information in the nature of *quo warranto*, does not apply to an information filed by the attorney general *ex-officio*.
2. *Officers, State—Commission—Salary—Liability—Ouster.*—He, who has the commission, is entitled to the emoluments of the office, until the State by proper proceedings revokes his authority; and the party properly entitled to the office has no recourse against the State for payments so made, but his recourse is against the person who so received the emoluments.

Application for Mandamus.

Ira E. Leonard and George D. Reynolds, for Relator.

The commission from the governor, invested the relator with the title, and so far as this inquiry is concerned, is not only *prima facie*, but conclusive evidence of his right to the office and its emoluments. (The State, *ex rel.* Jackson vs. Auditor, 34 Mo., 375; Winston vs. Auditor, 35 Mo., 146; The State, *ex rel.* Jackson vs. Auditor, 36 Mo., 70; Beck vs. Jackson, 43 Mo., 117; State *ex rel.* Vail vs. Draper 48 Mo., 213.)

The proceeding, if successful, would simply result in ousting the Relator, and leave the office vacant, to be filled according to law. (Hunter vs. Chandler, 45 Mo., 452.)

This law was intended to apply solely to that class of cases, where two or more private persons contested the office, and

State, ex rel., v. Clark, State Auditor.

not to this extraordinary official proceeding in the nature of a *quo warranto*.

H. Clay Ewing with Hill and Bowman, for Respondent.

A judge *de facto* is not entitled as between himself and the State, to draw his salary.

The law in question says: "Until the right to the same shall be legally determined between the persons or parties claiming such right."

The State is a party within the meaning of this act.

The controversy as to the judgeship in the 26th Circuit was the very cause of the passage of this law.

If it shall be finally decided, that the relator is not and never was the legally elected and qualified judge of the 26th Circuit, the person who is held to be the judge *de jure* would have the right to demand his salary from the auditor.

EWING, Judge, delivered the opinion of the court.

The relator, James H. Vail, presented his petition to this court for a writ of mandamus to the State Auditor, in which he alleges, that he was duly commissioned judge of the 26th judicial circuit of this State, on the 20th day of April, 1869, by virtue of which he has discharged and still discharges the duties of said office; and that on the 1st day of April, 1873, he presented to the auditor his account for salary as such judge for the quarter ending March 31st, 1873, and demanded a warrant therefor upon the treasurer, which the auditor refused to issue.

Upon this petition an alternative writ of mandamus was issued to the auditor. The auditor, in his return to this writ, alleges, as a justification of his refusal to issue a warrant to the relator, that he is prohibited from so doing by an act of the General Assembly approved Feb. 21, 1873, and that on said 1st day of April, 1873, and prior thereto, and at this time, the right to the office of judge of the 26th judicial circuit was and is disputed, and that a proceeding was then and is still pending in the court upon a writ of *quo warranto* for the purpose of determining that question, of which the relator

was duly notified. The return further showed, that when said account was presented to the auditor, and at the date of the return, there was a contest for said office of judge pending between the relator and Lewis F. Dinning.

The answer to the return admits the pendency in this court of an information by the State, at the relation of the attorney general, against the relator, but denies that there is any contest between the relator and Dinning for said office.

It is further alleged in the answer that the act of the General Assembly of February 21, 1873, referred to in the return, does not apply to an information officially exhibited by the attorney general at his own relation, nor does it apply to the office, pay or emoluments of a judicial officer, and that the act is unconstitutional and void.

It is agreed between the parties that the only contest or dispute pending in any court between the relator or any one else for the office of judge of the 26th judicial circuit is the one now pending in this court at Jefferson City at the relation of the attorney general.

The question for our determination involves the construction of the act of the General Assembly relied on by the respondent in his return to the writ. This act, which purports by its title to amend chapter 10 of the General Statutes, being chapter 137 of Wagner's Statutes, by adding two sections thereto, provides that whenever any office, elective or appointive, the emoluments of which are required to be paid out of the State treasury, shall be contested or disputed by two or more persons claiming the right thereto, or by information in the nature of *quo warranto*, then no warrant shall be drawn by the auditor or paid by the treasurer for the salary by law attached to said office, until the right to the same shall be legally determined between the persons or parties claiming such right; provided, however, that in all cases when the persons, to whom the commission for such office shall have issued, shall deliver to the party contesting his right to such office a good and sufficient bond in double the amount of the salary of such office, conditioned that, if upon the final de-

State, ex rel., v. Clark, State Auditor.

termination of the rights of the contestants it shall be decided that the obligor is not, and the obligee therein is entitled to the office in controversy, he shall pay over to the obligee the amount of salary therefor drawn by him as such officer, together with ten per centum interest thereon from the date of the receipt of each instalment received by him, then, and in this case, notwithstanding the provisions of such law, the warrant may be drawn by the auditor and paid by the treasurer to the person holding the commission aforesaid, for the amount of his salary as the same shall become due. It is further provided, that it shall be the duty of any person contesting the election of any such officer to give notice of such contest to the State Auditor, and no such contest shall be heard or determined, until he shall satisfy the tribunal trying such contest that the notice has been given.

It being admitted that there is no contest pending between the relator and any other person claiming the office he now holds, does the act apply to the proceedings instituted by the attorney general *ex-officio*?

It is made the duty of the auditor, when the office is contested by two or more persons claiming a right thereto, to withhold a warrant, unless the contestee shall give a bond to the contestor, conditioned that if, upon a final determination of the rights of the contestants, the obligor is found not entitled to the office, he shall pay over to the obligee the amount of the salary, &c.

This act obviously has no application to proceedings instituted by the State against persons for an alleged usurpation of a public office, such as is now pending in this court against the relator. There is no contest between two or more persons for the office. No one is claiming the right to the office against the relator in the sense of the act. There is no contestor to whom a bond is to be executed, or who has any rights that can be affected by the results of the proceedings, or who would be entitled to receive the salary previously paid to the relator in the event of his being ousted from the office. The attorney general certainly stands in no such relation to

the proceeding as to make these provisions applicable to him, or to the State, when he acts merely as a representative of the State in filing the information.

Information of this nature is filed by the attorney general, as a matter of course, and without leave of the court. It is a proceeding of a criminal nature as for a misdemeanor in the usurpation of a public office, in which he represents the State alone. There could be no inquiry into or adjudication of the claims of persons contesting the right to the office. This can only be made upon an information filed at the relation of a party claiming the office, and on leave specially granted for that purpose. It is insisted, however, that the clause of the act which says, "when any office is contested by two or more persons claiming the right thereto, or by information in the nature of a *quo warranto*" is comprehensive enough to include information filed by the attorney general *ex-officio*, and particular stress is placed on the last part of this clause. This interpretation implies or assumes that the act makes no distinction between informations of this nature with reference to their objects or purposes, that, whether it is a civil or criminal proceeding, whether it is instituted at the relation of the attorney general on behalf of the State or at the relation of an individual, it includes equally a contest between persons claiming the right to the office. It is also insisted that, as the primary object of the act was to protect the treasury against what is claimed to be unjust and illegal demands, it therefore applies to a contest by the State, as well as to a contest by an individual. This view results from the erroneous assumption, that the State would incur a double liability if the proceeding now pending against the relator should result in ousting him from the office, and that he is not entitled to the salary received in the meantime. The commission issued to the relator invested him with the title, and is *prima facie* evidence of his right to the office. It gave him the possession and the power to exercise its functions, of which he could be deprived only on due process, in the manner prescribed by law. State *ex rel.* Vail *vs.* Draper, 48 Mo., 213. He alone is entitled

to the emoluments of the office, until the State, by a proper proceeding, has revoked the authority with which it has invested him. Meanwhile the auditor cannot rightfully withhold the salary. There could therefore be no legal claim against the State for the salary so paid on the part of one who might hereafter establish a better right to the office. His recourse, if he has any, would in such case be against the relator, not the State. (*The Auditor of Wayne Co. vs. Benoist* and the authorities there cited, 20 Michigan 176; *Hunter vs. Chandler*, 45 Mo., 452.)

Peremptory writ ordered. The other judges concur, except Judge Sherwood who is absent.



CITY OF ST. LOUIS, Respondent, vs. DAVID FOSTER, Appellant.

1. *Ordinances—Ordaining clause, omission of—Act directory.*—An ordinance of a city is not invalid, because the ordaining clause is omitted; the law requiring such a clause, but not declaring the law void if that form is not pursued, is directory. (*City of Cape Girardeau vs. Riley*, ante p. 424—affirmed.)
2. *Statutes, validity of—Forms prescribed—Departure from—Ordinances—Authentication—Law directory.*—A statute authenticated in the manner pointed out by law cannot be impeached by showing a departure from the forms prescribed by the constitution in the passage of the law; and the same principle applies to municipal corporations (*Pacific Railroad vs. The Governor*, 23 Mo., 353 affirmed.) Such provisions or laws are directory, if there is no provision declaring such laws or ordinances void, if the said forms are not complied with.
3. *Ordinances—Revision of—Continuity.*—When a former law is included in a revised law, the revision has not the effect of breaking the continuity of those provisions which were in force before.
4. *Ordinances—Collation of—St. Louis, City of—Publication—Seal—Proof.*—When the ordinances of the City of St. Louis are collated and published by authority of the city they are admissible in evidence without any seal or attestation.

Appeal from St. Louis Criminal Court.

L. M. Shreve, for Appellant.

The ordinance was invalid, because it had no enacting clause. The book of ordinances, a revision, has but one ordinance pro-

perly enacted, whereas each ordinance must be for itself ordained. The ordinance was also invalid, because it had not been read in council three different days, and also because it was not printed and published as required by charter; nor was it admissible in evidence, not being certified by the register.

E. P. McCarty, for Respondent.

"Revised Ordinances 1871" constitute *one* ordinance at the beginning of which is the ordaining clause.

The provision for publication of ordinances is merely directory. *Elmendorf vs. Mayor of New York*, 25 Wend., 696.

The statute roll or authorized publication is conclusive in this action that this *is* the law. (*Pacific Railroad vs. The Governor*, 23 Mo., 362; *Treasurer of City of Camden vs. Mulford*, 2 Dutch, 49.)

It was not necessary that the copy of ordinance introduced in evidence should be certified by the city register.

WAGNER, Judge, delivered the opinion of the court.

The defendant was prosecuted for violating an ordinance of the City of St. Louis, prohibiting the setting up and keeping gaming tables and gambling devices. Upon the trial the defendant objected to the admission of the City ordinances in evidence, on the alleged ground, that they were invalid. The objection was overruled, and this constitutes the main error relied on.

It is first contended that the ordinance is void and of no effect, because the style or ordaining clause appear to have been omitted. The Charter requires, that the style of the ordinances passed by the City of St. Louis shall be.—"Be it ordained by the City Council of the City of St. Louis," but it is now here declared, that if this form is not pursued, the ordinances shall in consequence thereof become void. This question has been considered by the Court at the present term in the case of the City of Cape Girardeau vs. *Riley et al.*, (ante p. 424) where in a Legislative Act, the constitutional requirement of an enacting clause was omitted, and we held, that the provision as to the style of laws was directory, and

that a law passed with all the forms and solemnities prescribed by the constitution, would not be rendered invalid, because the style or enacting clause failed to appear in the act. That case is decisive of the point we are now considering; though as a fact the objection does not seem to be true, for the revision of the City of Ordinances digests them all into one, and it commences with the proper style.

The Charter further provides, that every ordinance shall be read on three different days of the stated session, at which, and before it was passed, and the objection was interposed to the reading of the ordinance, that this direction was not pursued. But notwithstanding this, the Court admitted it.

The law on this subject was elaborately considered in the case of the *Pacific R. R., vs. The Governor*, (23 Mo., 353,) and will be unnecessary to restate what was so well said by the learned Judge, who wrote the opinion in that case. It was clearly decided, that the validity of a statute, authenticated in the manner pointed out by law, could not be impeached by showing a departure from the forms prescribed by the Constitution, in the passage of the law. The same principle applies to municipal corporations.

Their Charters are their Constitutions, which authorize the Councils to act, and a City Council is "a miniature General Assembly, and their authorized ordinances have the force of laws passed by the Legislature of the State."

A provision in a city Charter, that the yeas and nays shall be called and published, whenever the vote of the Common Council should be taken on any proposed improvement involving a tax or assessment upon the citizens, was considered by the Supreme Court of New York, notwithstanding the use of the word "shall," to be directory merely; "the essential requisite being the determination of the corporation, and not the form or manner of expressing that determination" (*Striker vs. Kelley*, 7 Hill 9; *S. C.*, in *Error*, 2 Denio, 323; *Indianola vs. Jones*, 29 Iowa, 282; *In re Mount Morris Square*, 2 Hill 20; *Elmendorf vs. Mayor &c.*, 25 Wend., 693.)

In construing the Constitution of New York, which requires

the question upon the final passage of a bill to be taken upon its last reading, and the yeas and nays to be entered upon the journal, Willard, J., speaking the unanimous voice of the Court of appeals, says: "The legal presumption is, that a law, published under the authority of the government, was correctly passed, so far at least as relates to matters of form. * * * Again, the provision of the Constitution, requiring the question upon the final passage of a bill to be taken upon its last reading, and the yeas and nays entered on the journal, is directory to the Legislature. There is no clause declaring the act void, if this direction is not followed." (*People vs. Supervisors*, 4 Seld., 317.)

As the ordinance had all the marks of being valid, and appeared to be regularly passed, and was published by authority, we are satisfied that it could not be rejected as evidence on the alleged ground that it was incorrectly passed as to matters of form. The next question is, was the ordinance invalid by reason of its not being published in the papers doing the City printing within five days from its passage? The Charter declares that all ordinances passed by the City Council shall be published within five days after they become laws. But this provision plainly refers to the ordinary passing of the ordinances from time to time, as the Council may see fit or deem proper. It was designed to notify the public at as early a period as possible of the passage and provisions of the laws, which were to govern them. But the case is different here. The book of ordinances offered and admitted in evidence did not contain new ordinances, but simply a revision and digest of the old ones.

They had been previously regularly passed and published, and their existence did not date from the time the revision took effect. In *St. Louis vs. Alexander* (23 Mo., 509,) this Court said: "It would be of the most mischievous consequence to hold that the revision of a law had the effect of making the revised law entirely original, to be considered as though none of its provisions had effect but from the date of the revised law. When a former provision is included in a revised law, it is only

thereby intended to continue its existence, not to make it operate as an original act to take effect from the date of the revised law. The revision has not the effect of breaking the continuity of those provisions which were in force before it was made."

There is no force in the point, that the book of ordinances was inadmissible, because the seal of the corporation attested by the register was not attached to it. The law is that all ordinances, resolutions and proceedings of the City may be proved by the seal of the corporation, attested by the Register, and, when printed and published by authority of the corporation, the same shall be received in evidence in all Courts and places without further proof.

When the ordinances are collated, and printed and published by authority of the Corporation, they are then admissible in evidence without any seal or attestation.

The other questions raised are destitute of merit. The permitting of the plaintiff to introduce evidence, after it was announced the case was closed, was a matter resting in the sound discretion of the Court, and it does not appear that that discretion was unsoundly exercised, or that the defendant was injured by it. As to the ordinance being inconsistent with the laws of the State, it is sufficient to say, that that point was not included in the motion for a new trial, and of course, cannot be noticed here.

For the foregoing reasons, I am of the opinion, that the judgment should be affirmed, and the other Judges concurring, it will be so ordered.

Silver, et al., v. McNeil.

DAVID H. SILVER, *et al.*, Respondents, *vs.* JOHN MCNEIL, Appellant.

1. *Sheriff—Levy by—Excessive.*—A sheriff levied on a steamboat, worth about forty thousand dollars, by virtue of an execution for \$109. *Held*, that the levy was excessive; that he might have satisfied his execution by levying on a small part of the furniture.

Appeal from St. Louis Circuit Court.

Chester Harding, for Appellant.

The damages were flagrantly excessive.

Slayback & Haeussler, for Respondents.

The sheriff was not bound to levy on more goods than enough to satisfy the debt. If by doing so he occasion a loss out of proportion to the amount of the execution he is trying to make the money on, he can blame no one but himself. (State vs. Doan, 39 Mo., 52.)

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a replevin for the recovery of the steamboat "Peoria City," her hull, engines, machinery, tackle and furniture.

The only point raised and discussed by the appellant's counsel is, that the damages allowed by the jury were excessive, and not warranted by the facts and proof in the case. The amount of damages found by the jury was twenty-five hundred dollars.

The testimony shows that the defendant was sheriff of St. Louis County, and as such had in his hands an execution in favor of Josiah Fogg against Thomas Shields for \$109, which he levied on a supposed interest of Shields in the boat, by seizing the boat, her apparel, &c., and retaining possession thereof for twelve or thirteen days, when this suit was brought, and bond given by plaintiffs, and the boat restored to their possession. At the time the levy was made, the boat was on the docks, undergoing repairs, and the defendant put a man on the boat to hold possession, but did not interfere with the plaintiffs in repairing the boat.

The plaintiff in substance testified, that he called on the defendant, and tried to get him to release the boat without suit, assuring him that Shields had no interest at all in the boat, and also testified, that he was unable to procure the required bond any sooner than he did, in order to bring suit. That he could have had the boat ready in two days for a trip, which was then being made up; pilots, &c., had been employed for the trip. He stated the boat was insured for \$35,000.00, on a valuation of \$45,000.00; that the boat was considered worth from \$400.00 to \$500.00 per day. Two other witnesses testified, that the boat was worth from \$35,000.00, to \$40,000.00, and would have been chartered at from \$350.00 to \$400.00, per day, during the time she was detained. There was no testimony showing, that the use or hire of the boat would have been less than the amounts above stated.

The testimony on the part of the defense conduced to prove, that the plaintiff was not prevented by the defendant or his agents, from repairing the boat, and that the boat was not reaworthy when she was replevied.

From this evidence it would seem, that the jury were not actuated by prejudice, and that the verdict is fully sustained by the evidence.

In the first place, even if Shields had had an interest in the boat, the levy was excessive. The defendant might have levied on a part of the furniture, and left the boat in the hands of the plaintiff. The execution was only \$109, and a very small part of the furniture would have been sufficient to satisfy it. But Shields had no interest whatever in the boat, and there was no justification for the seizure.

The instructions presented the case fairly to the jury. They were instructed to allow the actual damages sustained by the plaintiffs. Under the evidence I do not see how they could have allowed less than twenty-five hundred dollars for the detention of the boat.

Let the judgment be affirmed. The other judges concur.

HENRY BURNS Respondent, *vs.* ANDREW T. WHELAN, Appellant.

1. *Practice, civil—Trials—Evidence, introduction of.*—The introduction of evidence in chief, by the plaintiff after the close of defendant's evidence, is a matter largely in the discretion of the trial court, but it might be error if it worked injustice.
2. *Practice, civil—New trial, motion for—Objections presented—Consideration by Supreme Court.*—Objections to the action of the court below, must be presented to that court on a motion for a new trial, or they will not be considered by this court.

Appeal from St. Louis Circuit Court.

N. A. Mortell, for Appellant.

Thos. Grace, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action on two contracts, one for building a house, and the other for building a fence.

A verdict and judgment were rendered for the plaintiff, and this judgment was affirmed at General Term.

The only point discussed here is, that the court, after the close of the defendant's evidence, suffered the plaintiff to introduce additional evidence in chief.

It does not appear from the record, that the defendant was injured by this action of the court. The allowance of this sort of practice is largely in the discretion of the Circuit Court. Where it would produce injustice, it might be error to suffer this course to be pursued. But in this case the point is not properly before us. It is not presented by the motion for a new trial. It is not sufficient merely to object at the trial. The same objection must be made in the motion for a new trial, in order that the court below may have a chance to correct its own errors.

Judgment affirmed. The other Judges concur.

Slagel, Administrator v. Murdock.

JOHN SLAGEL, Administrator *de bonis non* of OLIVER E. SNIDER, deceased, Defendant in Error, *vs.* LINDSAY MURDOCK, Plaintiff in Error.

1. Snider vs. Murdoch, 51 Mo. 175 affirmed.

Error to St. Francois Circuit Court.

Greene & Gilroy, Martin L. Clardy & Geo. D. Reynolds for Defendant in Error.

B. B. Cahoon, John F. Bush, John B. Robinson, Krum & Patrick, Barret & Hilton, for Plaintiff in Error.

ADAMS, Judge, delivered the opinion of the court.

At the October Term 1872 of this court, this case stood on the docket in the name of Alexander B. Snider, executor of Oliver E. Snider deceased, against Lindsay Murdock, and the court at that term delivered an opinion affirming the judgment of the Circuit Court.

At the present term of the court a motion was filed to set aside the judgment rendered at the last term, because Alexander B. Snider, in whose name it was rendered, was dead when the judgment of affirmance was rendered.

This motion was sustained, and the judgment of affirmance was set aside.

Since the foregoing proceedings were had, John Slagel, who has been appointed administrator *de bonis non* of the estate of Oliver E. Snider, deceased, appeared in court here, and by consent of parties is substituted as plaintiff, and the case has been again submitted for our consideration.

I have examined the record and see nothing to change the views of the court as laid down in the opinion delivered at the last term. That opinion will therefore be adopted as the opinion now of this court.

The judgment of the Circuit court is affirmed, and revived in the name of the plaintiff as administrator *de bonis non* of Oliver E. Snider deceased. The other Judges concur.

Aubuchon v. St. Louis & Iron Mountain Railroad Co.

F. T. AUBUCHON, Plaintiff in Error, vs. ST. LOUIS & IRON MOUNTAIN RAILROAD Co., Defendant in Error.

1. *Practice, civil—Pleading—Statement of cause of action.*—The petition alleged that the defendant, a railroad company, negligently and carelessly ran over and killed some of the cattle of the plaintiff, and that the same was done at a part of the road that was not enclosed by a lawful fence, and that was not a public road crossing. *Held*, that the petition set out a good cause of action.

Error to Washington Circuit Court.

G. I. Van Allen, for Plaintiff in Error.

“Negligence may be established, either by proof of the facts and circumstances attending the transaction, or by showing that the injury was done on a part of the road not enclosed by a lawful fence, or not on the crossing of a public highway.” (*Calvert vs. Hannibal & St. Joe. R. R. Co.* 38 Mo., 467.)

This petition was drawn in accordance with the opinion of this court as expressed in the same case reported 34 Mo. 242.

Dryden & Dryden, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

It is utterly impossible to sustain the judgment of the court below in this case. The petition alleged, that defendant negligently and carelessly ran over, maimed, and killed, certain cattle belonging to the plaintiff, and that the same was done on a part of its road that was not enclosed by a lawful fence and that was not a public road crossing. At the trial the court refused to permit the plaintiff to introduce any evidence to sustain his averments, on the ground that the petition did not state a cause of action.

This ruling was certainly erroneous. The pleading set out a good cause of action and the judgment will be reversed and the case remanded. The other Judges concur; except Judge Sherwood, absent.

JOHN MORAN, Respondent, *vs.* D. A. JANUARY, Appellant.

1. *Practice, civil—New trials—Motions.*—The motion for a new trial must be made within four days after the trial, if the term shall so long continue, and if not, then before the end of the term.

Appeal from St. Louis Circuit Court.

Thos. Grace, and John Hallum, for Respondent.

If a party against whom a verdict is found and judgment given fail to file his motion for a new trial within the four days prescribed by the statute, but subsequently files his motion, which is overruled, no writ of error will lie from the judgment overruling the motion. (W. S., 1059, § 6; Richmond's Adm'x vs. Wardlaw, 36 Mo., 313; Nordmanser vs. Hitchcock, 40 Mo., 178; Frederick vs. Rice, 46 Mo., 24; State vs. Marshall, 36 Mo., 400.)

WAGNER, Judge, delivered the opinion of the court.

In this case a judgment was regularly rendered for the plaintiff, and twelve days after the rendition of the same, and without leave of court, a motion was filed for a new trial.

The motion was overruled. The statute provides that all motions for new trials or in arrest of judgment shall be made within four days after the trial, if the term shall so long continue, and if not, then before the end of the term. (2 W. S. 1059, § 6.)

Under the above section the uniform course of decision has been, that unless the motion is filed within the four days prescribed, no writ of error or appeal will lie from the judgment of the court overruling the same. (State vs. Marshall, 36 Mo., 400; Richmond vs. Wardlaw, 36 Mo., 313; Banks vs. Lades, 39 Mo., 406; Bishop vs. Ransom, 39 Mo., 416; Farmers Bank vs. Bayliss, 41 Mo., 274; Long vs. Towl, 41 Mo., 398; Morgner vs. Kister, 42 Mo., 466.)

It follows therefore, that the appeal must be dismissed. The other Judges concur.

Porter v. Harrison.

HENRY PORTER, Respondent, vs. CHARLES H. HARRISON, Appellant.

1. *Practice, civil—Trials—Instructions—Facts in evidence.*—Instructions should always be framed with reference to the facts in evidence.
2. *Practice, civil—Trials—Instructions taken together—Whole case.*—It is sufficient if the instructions taken together present the whole case in a way that is not calculated to mislead.
3. *Practice, civil—Court, Supreme—Re-trial—Expenses.*—Where the cost of a re-trial would be almost as great as the amount in controversy, this court will not interfere, unless it clearly appear that the jury have been misled to the prejudice of the appellant.

Appeal from St. Louis Circuit Court.

M. W. Hogan, for Appellant.

Horatio D. Wood, for Respondent.

The instructions given for the plaintiff and defendant fully present the law, and it is not necessary that all the principles of law relating to the case should be presented in any one of the instructions given by either party. (*McKeon vs. Citizens Railway Co.*, 43 Mo., 405; *Moore vs. Sauborin*, 42 Mo., 490; *Marshall vs. Thames Fire Ins. Co.*, 43 Mo., 586.)

VORIES, Judge, delivered the opinion of the court.

The plaintiff charges, that his horses, which being hitched or harnessed to his wagon, were securely hitched with a strap on Tenth street, on which street, it being a public highway, he was driving and had occasion to stop, and that the defendant was possessed of a carriage and horses, which were also at said time being driven and conducted along said street by a servant in the employ of defendant for that purpose; that by the negligence and carelessness of the said servant of the defendants, his said carriage was driven upon and against said wagon of plaintiff, thereby causing plaintiff's horses to break loose from where they were hitched and run away with said wagon, whereby the horses were injured, the wagon broken; and that plaintiff was bruised and injured in attempting to hold and secure his said team and wagon, and for all which he asked a judgment for damages.

The defendant denied the allegations in the petition, and

charged that the injury, if any, happened by reason of the negligence of plaintiff. The plaintiff replied, and denied the negligence charged against him.

The cause was tried before a jury. The jury found a verdict for plaintiff for one hundred and seventy five dollars. Judgment was rendered on the verdict.

The plaintiff at the trial introduced evidence which tended to prove the facts stated in the petition, and tended to prove that the injury accrued by the negligent driving of defendant's team and carriage by defendant's servant.

The defendant gave evidence tending to prove, that his servant was not negligent, and also to prove that plaintiff's horses were not hitched or properly secured.

At the close of the evidence, the court on the part of the plaintiff instructed the jury: 1st. "If the jury believe from the evidence, that one Gerius while employed by the defendant, negligently drove into plaintiff's wagon, thereby causing said plaintiff injury, then the plaintiff is entitled to recover."

2nd. "If the jury find for the plaintiff, they will assess the damages at such sum, not exceeding the amount claimed in the petition, as will compensate the plaintiff for injuries to his property, loss of time in the use thereof, and also for injuries to his person, and physical pain thereby occasioned directly, if the jury believe from the evidence that plaintiff did endure physical pain and suffering directly consequent upon the act of defendant."

The defendant objected to said instruction and excepted.

The court then, at the instance of the defendant, instructed the jury, that "If they believe from the evidence, that the injuries complained of by plaintiff could have been avoided by plaintiff, if he had exercised proper and reasonable caution and care, they should find a verdict for the defendant."

2nd. "Although the jury should believe from the evidence that the collision between plaintiff's and defendant's teams, had occurred without any fault or negligence upon the part of plaintiff, yet if they believe that the plaintiff by the exercise of reasonable care and skill might have avoided the in-

juries that resulted after the collision, they should exclude those injuries from their consideration, and find a verdict for the defendant."

The defendant also moved the court to instruct the jury as follows :

"If the jury believe from the evidence, that the plaintiff's horses were not properly secured and made fast, and that circumstance contributed to the collision, they should find a verdict for the defendant."

"If the jury believe from the evidence, that the plaintiff through any fault or negligence upon his part in not properly hitching his horses, or in any other way, contributed to the injuries complained of, they should find a verdict for the defendant."

The court overruled these two last instructions, and the defendant excepted.

After the verdict, the defendant in due time filed a motion for a new trial, setting forth as grounds for said motion, the rulings of the court hereinbefore excepted to. This motion being overruled, the defendant again excepted, and appealed to the General Term of the Circuit Court, where the judgment of Special Term was affirmed, from which last judgment an appeal was taken to this court.

The only point presented by the appellant in his argument for the consideration of this court, is as to the propriety or impropriety of the rulings of the court that tried the cause, in the giving and refusing of instructions to the jury. Instructions should always be framed with reference to the facts in evidence to which they are to apply, and it is much more satisfactory for an instruction not only to be framed in reference to the plaintiff's theory of the case, but also to cover the ground assumed by the defendant in his defense, but this is not always necessary, provided the instructions given, all taken together, fairly present the law of both sides of the case to the jury, and present the whole case in a way that is not calculated to mislead. (*Moore vs. Sauborin*, 42 Mo., 490; *McKeon vs. Citizens Railway Co.*, 43 Mo., 405; *Marshall vs.*

Thames Fire Insurance Co., 43 Mo., 586 ; also, Budd vs. Hoffheimer, *ante* p. 297.)

In the case now being considered, the first instruction, if taken alone, would be subject to the objection that it ignores one ground of the defendant's defense, but, when it is taken in connection with the instructions given at the request of the defendant, we think altogether they fairly present the law growing out of the facts of the case. The evidence does not pretend to show, that the plaintiff was guilty of negligence in leaving his wagon where it was ; it is only attempted to show, that, from the condition of the street and the wagon, the defendant, when taking the circumstances into consideration, was not guilty of negligence. The negligence of the plaintiff, as attempted to be shown, was that he had not safely hitched and secured his team, and thereby that he had contributed to the damage done.

We think that the instructions given, though not very carefully drawn, when taken together fairly placed the case to the jury, and if this was done, it is not necessary to further examine the instructions refused.

In a case like this, where the cost of a re-trial would be almost as much as the whole amount in controversy, unless it clearly appears that the jury have been misled to the prejudice of the appellant, this court will not interfere.

Judge Sherwood not sitting, the other Judges concurring, the judgment of the St. Louis Circuit Court will be affirmed.

Duffy v. Gray.

HENRY P. DUFFY, Respondent, *vs.* HOWARD GRAY, Appellant.

1. *Practice, civil—Slander—Partners—Joint judgment—Individual suit—Bar.*
—A joint judgment, procured by partners in business in a slander suit, is no bar to a several suit by one of the partners on the same cause of action.

Appeal from St. Louis Circuit Court.

Krum & Patrick, for Appellant.

I. A party can have but one satisfaction for the same wrong. (Thomas *vs.* Rumsey, 6 Johns. 26; Webb *vs.* Cecil, 9 B. Monroe, 198.)

II. The record showing recovery and satisfaction in the former case, was competent evidence in this case in mitigation of damages.

Lee & Adams, for Respondent.

Partners, as a partnership, cannot recover in slander for injury to their private feelings and personal character, but only for damages to their joint trade or business. (Collyer on Partnership, § 680; Story on Partnership, §§ 256, 257; Townsend on Slander, 381; Selwyn's *Nisi Prius*, p. 1260; Taylor *vs.* Church, 1 E. D. Smith, 287; Townsend on Slander, 201.)

ADAMS, Judge, delivered the opinion of the court.

This was an action for slander. The actionable words charged in the petition are, "Duffy & Kincer are damned thieves and swindlers."

Duffy & Kincer were partners, doing business as merchants under that name, the individual members being, plaintiff and one Abner Kincer. They had brought a joint action against the defendant for injury to their business on account of these words, and recovered a judgment for one dollar and costs, which had been paid by the defendant.

The defendant set up this former recovery and satisfaction, as a bar to this action.

On the trial the court ruled out this defense, and this ruling of the court presents the only material point for our consideration.

In my judgment, the former recovery and satisfaction were

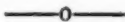
St. Louis Tow Co., v. The Orphans Benefit Insurance Co., of St. Louis.

not admissible, either as a bar, or in mitigation of damages. This action is for a personal injury to the character of the plaintiff, and the former suit was for a joint injury to the trade and business of the firm of "Duffy & Kincer." The members of the firm could have no legal interest whatever in the personal character of each other.

The slander to the individual character of each member of the firm could not be a joint tort. It was necessarily a separate and distinct injury, for which a several, and not a joint action, could be maintained. (See also, Townsend on Slander, §§ 185 and 303; Haythorn *et al.* vs. Lawson, 3 C. and P., 196.)

The only damages the partnership could have recovered was for the injury to their joint trade and business. (See Col. on Part., § 680; Story on Part., §§ 256, 257; Townsend on Slander, 381.)

Let the judgment be affirmed; Judge Wagner absent, the other Judges concur.



ST. LOUIS TOW COMPANY, Respondent *vs.* THE ORPHANS BENEFIT INSURANCE COMPANY OF ST. LOUIS, Appellant.

1. *Practice civil—Trials—Pleading—Confession and avoidance—Burden of proof.*
The burden of proof is on a defendant who in his answer confesses and avoids the allegations of the petition.

Appeal from Wayne Circuit Court.

Stewart & Wieling, for Appellant.

No cause of action was stated in the petition.

Henry D. Laughlin, for Respondent.

The respondent was entitled to the instruction asked for.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff, as assignee of Hackett & Ackle, commenced this action to recover the amount of a policy of insurance,

St. Louis Tow Co., v. The Orphans Benefit Insurance Co., of St. Louis.

made by the defendant on a quantity of cement, which was being transported from the Ohio River to St. Louis. The cement was greatly injured, while in the process of being loaded on a barge lying at New Albany. The answer of the defendant admitted the facts set forth in the petition, but alleged new and independent matters of defense. To these defenses there was a replication filed. At the trial, as the defendant took upon itself the *onus* or burden of proof, it claimed the right to open and close the case. This right was awarded to it by the Court.

Upon the conclusion of the testimony the plaintiff asked the Court to instruct the Jury; that it was admitted in the case, that the plaintiff had a *prima facie* right to recover, and that the verdict ought to be for the plaintiff, for the amount claimed, unless defendant had made out some legal defense, to the satisfaction of the jury.

This instruction the Court refused, and then in its second instruction, given at defendants instance, it cast the burden on the plaintiff of proving, that the affirmative allegations set up in the answer, were not true. This was really its effect. The verdict was for the defendant. The case was then taken to General Term, where the ruling at Special Term was reversed, and defendant appealed.

The ruling of the Court at Special Term was unquestionably wrong.

When the defendant admitted the cause of action as stated in the petition, by not denying any of its allegations, it confessed that the plaintiff had a good case, and it undertook to avoid it, by making averments which would destroy the *prima facie* case set out in the petition. These averments it devolved on defendant to prove. It assumed the attitude of a plaintiff, opened and closed the case, and undertook to establish the independent matter set up. Unless it satisfied the jury by its proof that its allegations were true, the plaintiff was certainly entitled to a verdict. After the plaintiff's case was admitted by the pleadings, the Court at Special Term still required it to prove up its case, and to show further that it had done nothing that would impair or vitiate the policy.

Horton v. Bayne.

The Judgment at General Term ought to be affirmed.
The other Judges concur.

—o—

BENJAMIN HORTON, Respondent, vs. RICHARD W. BAYNE, Appellant.

1. *Bills and notes—Transfer before maturity—Consideration, when may be inquired into.*—An indorsee of negotiable paper before maturity is presumed to be the owner in good faith and for value, unless there are circumstances antecedent to, or attendant on, the act of transfer, amounting to either actual notice to the holder, of fraud, illegality or failure of consideration, or to such a combination of suspicious circumstances, as would in legal contemplation afford ground for the presumption that the purchaser of the paper was aware, at the time of its acquisition, of some equity between the original parties thereto, which should have prevented its purchase by him.

Appeal from St. Louis Circuit Court.

Jno. J. Louthan and A. D. Lewis, for Appellant.

When the maker of a note endorsed before maturity proves lack of consideration therefor, the burden of proof is on the holder, to prove that he received it for value. (Story on Bills, 215, § 193; Bryant and Stratton's Commercial Law, 174, § 365; Rogers vs. Morton, 12 Wend., 484; Munroe vs. Cooper, 5 Pick., 412.)

James E. Withrow and John C. Anderson, for Respondent.

The holder of any negotiable paper before it is due, is not bound to prove that he is a *bona fide* holder for value, without notice. (Swift vs. Tyson, 16 Peters, 15; Story on Promissory Notes, (Ed. 1868,) 510, § 381; Potter vs. McDowell, 43 Mo., 97; Chitty on Bills, (11th Ed.,) 78 and 79; Savings Bank vs. Bates, 8 Conn., 505; Story on Bills 207, § 188; Bayley on Bills, § 3; W. S. 216, § 15; 1061 § 25.)

SHERWOOD, Judge, delivered the opinion of the court.

Plaintiff, Horton, brought suit in the St. Louis Circuit Court against Bayne on a negotiable promissory note, executed and delivered by the latter to one Partridge.

The petition, after the usual averments, states that the note sued on was, before its maturity, indorsed by Partridge for value and delivered to plaintiff.

The answer of Bayne admits the execution of the note, as charged in the petition; admits the transfer by indorsement of the note from Partridge to plaintiff, but claims that such indorsement was without consideration, and fraudulently made in order to cut off the defendant from making any defense, also for that purpose the assignment of the note was made subsequent to its maturity, and fraudulently antedated.

And the answer in conclusion pleaded a total failure of consideration; i. e., that the note was given for fruit trees, warranted to be sound and thrifty, but which were damaged, unsound, frozen and worthless, and that plaintiff was apprized of all this prior to the assignment.

There was a reply to this answer, traversing its chief allegations.

At the trial, the only evidence adduced on the part of defendant tended to show that the trees, for which the note was given two or three days after their reception by defendant, were utterly worthless, but it did not appear that plaintiff was aware of any failure of consideration, and the court at the instance of plaintiff, instructed the jury that:

"Under the law it devolves upon the defendant to prove the fraudulent assignment of said note to plaintiff, or that it was assigned to plaintiff after maturity, or that the consideration of said note had wholly failed, and that plaintiff had notice of such failure of consideration at and before the assignment of said note to plaintiff by said Partridge."

"The court further instructs the jury, that there is no evidence to prove or tending to prove either of these defenses, and the jury will find for the plaintiff the amount of said note and interest."

The defendant excepted to the action of the court in giving these instructions, and then asked the court to give on his behalf the following:

"The court instructs the jury, that, if they believe from the

evidence that the note in suit was given for fruit trees delivered by Partridge to Bayne, and that said fruit trees were at the time of their delivery warranted by Partridge to be sound and thrifty, and that at the time of their delivery they were unsound and of no value, they will find for the defendants Bayne."

This instruction was refused, defendant again excepted, and after verdict for plaintiff, and unsuccessful motion for new trial, this cause is brought here by appeal.

The law is too well settled to admit of discussion, that the indorsee of negotiable paper before maturity, is presumed to be the owner in good faith and for value, unless there are circumstances antecedent to, or attendant on the act of transfer, amounting to either actual notice to the holder of fraud, illegality or failure of consideration, or to such a combination of suspicious incidents, as would in legal contemplation afford ground for the presumption that the purchaser of the paper was aware at the time of its acquisition of some equity between the original parties thereto, which should have prevented its purchase by him.

A doctrine contrary to this would completely overthrow the negotiability of commercial paper.

The indorsement of the note in this case must be presumed to have been made at the time it bears date, and that was long anterior to the maturity of the note. The defendant however, shouldered the burden of establishing the affirmative statements of his answer.

But his testimony did by no means comport with, or support his pleadings, nor did it have the slightest tendency in that direction.

The instructions of the court in behalf of plaintiff were therefore correct, and for like reasons there was no error in the refusal to instruct as prayed by defendant.

Judgment affirmed. The other Judges concur.

Field v. Stagg.

WILLIAM S. FIELD, Respondent, vs. HENRY STAGG, Appellant.

1. *Conveyances—Deed executed without the grantee being named—Parol authority to fill in name of grantee—Validity.*—A deed regularly executed in other respects, with a blank left therein for the name of the grantee, and placed in that condition in the hands of a third person with verbal authority, but no authority under seal from the person who executed it, to fill up the blank in his absence and deliver the deed to the person whose name is inserted as grantee, when so filled out and delivered is a valid deed.

Appeal from St. Louis Circuit Court.

P. E. Bland, for Appellant.

I. The central question in this case is, where a deed of conveyance is executed in blank as to the grantee, and then delivered in that condition to a third person, and without authority under seal from him who executed it, and in his absence such third person fills the blank and delivers the deed:—Whether such deed with its covenants is valid or void.

In this State the question is *res integra*—The court in passing on it will neither be enlightened nor embarrassed by any former adjudications of this court, and therefore free to follow the rule of the common law, in the light of reason and authority.

The broad and well defined distinction, taken at common law, between deeds and other instruments of writing, will not be questioned by any one. Out of this distinction comes the rule at common law, which it is apprehended no one questions, that he who executes, or makes a deed for another, must be authorized thereto by deed.

If then the filling of the blank in this deed was in its nature, essence and effect, the making of a deed for the plaintiff, it clearly comes within the rule above stated, and in order to render the deed, thus filled in, valid, it must have been authorized under seal.

The proposition appears obvious to the reason on its naked statement, that where the blank to be filled is of a nature so material, that, while it remains, the instrument is no deed, and can have no legal effect, the filling in of such blank, by what-

ever hand, over the signature and seal of the grantor (in conveyances) or obligor (in bonds) is essentially the making of the deed:—because it is the act which completes and gives it legal operation; for, without that, nothing passes by the instrument—no one is bound by it.

The principle is, that one person cannot bind another person, by deed in his name, without authority under seal to do so. No one will deny, that a deed of conveyance without any grantee is utterly inoperative and void—is no deed. How then is it possible to deny, that the act of inserting a grantee in such a deed, after its execution, in the absence of the grantor, is essentially, in its very nature, *the act of making the deed, since it adds that, without which it was no deed*. This addition may be made by the party who executed the deed, before its delivery by him, because his delivery was the completion of his acts touching the instrument, and the same power resides in him to make the addition, as to sign and seal—it is his act. If then the filling of the blank by the grantor, after the execution of the instrument, with the name of the grantee, is in such case the essential act in making the deed, and therefore *makes* the deed, is it less true that the same act (when duly authorized) *equally makes the deed*, if done by a third person or attorney?

The whole question resolves itself back, then, to this proposition, that he who fills a blank for grantee, left in a deed of another, so as to make it the valid deed of that other, in his absence, must be empowered by deed so to do. Without such power, the deed so filled up and delivered is utterly void. Viewing the question in the light of principle, there can be no doubt or difficulty in arriving at these conclusions.

But we appeal not less confidently to authority. (Hibblewhite vs. McMorine, 6 M. & W., 213-214; 1 Greenl. on Ev., § 568 a.; Note m, 1, Sharswood's Ed. of Starkie on Ev., p. 456.)

Judge Parsons gives his sanction to the rule, where he says: "If there be blanks left in a deed affecting the meaning and operation in a material way, and they are filled up after exe-

cution, there should be a re-execution, and a new acknowledgment. (2 Par. on Cont., pp. 723-4; Smith on Contracts, Am. Ed., p. 56, note 1; Cross & Bizzell vs. State Bank, 5 Pike, 531; Gilbert vs. Anthony, 1 Yer., 69; Wynn *et al.* vs. The Governor, *Id.* 149; Lockhart vs. Roberts, 3 Bibb., 361; Bank of Limestone vs. Penick, 5 Monroe, 25; Harrison vs. Tiernan, 4 Rand., 179; Byers vs. McClannahan, 6 Gill. & John, 253-4; Perminter vs. McDaniel, 2 Hill, 267; Davenport vs. Slight, 1 Dev. & Bat., 381; McKee vs. Hicks, 2 Dev., 379; Ayres vs. Harness, 1 Ohio, 173; Pigot's case, 11 Conn., 27; Starr vs. Lyon, 5 Conn., 540.)

II. The deed as appears upon its face was not only executed by signing and sealing, but was also duly acknowledged before the proper officer, and such acknowledgment certified thereon. And the petition shows that it was so executed and acknowledged in blank; for it never returned to the parties executing and acknowledging it, after its delivery in blank to Mr Stagg.

The deed was therefore void, not only because of the matters above considered, but was void because of the alteration made therein after the acknowledgment.

R. E. Rombauer, for Respondent.

This deed was perfect and complete before *its delivery* by Stagg, the plaintiff's agent, to Boyce, and if a perfect deed before delivery, even if not perfect before execution, it is sufficient on reason, and sufficient according to the best reasoned authorities. (Duncan vs. Hodges, 4 McCord, South C., 239; Inhabitants South Berwick vs. Huntress, 53 Me., 90; McDonald *et al.* vs. Eggleston, Barker & Co., 26 Vt., 161, 162; Speake *et al.* vs. United States, 9 Cranch., 28; Smith vs. Crookes *et al.* 5 Mass., 538.)

In Drury vs. Foster, 2 Wall. U. S., 33—where a deed executed by a married woman in blank, and subsequently fraudulently filled up by her husband, was held void,—Judge Nelson in delivering the unanimous opinion of the court says, that, "although it was at one time doubted whether a parol

Field v. Stagg.

authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient."

The cases which hold a different doctrine will, upon examination, be found to be cases where the alteration was either made after delivery, as the case of *Hibblewhite vs. McMorine*, 6 Mees & W., 200, and cases cited in note *e.* pp. 215, 216—or cases where the blank was fraudulently filled up contrary to the intention of the grantor.

VORIES, Judge, delivered the opinion of the court.

The plaintiff was the owner of certain lots in the City of St. Louis, upon which there existed certain mortgages or deeds of trust given by plaintiff to secure the aggregate sum of over three thousand dollars. The petition in this action charges, that plaintiff contracted with defendant to sell defendant said land or lots, and to convey the same to him in consideration of an amount named and in further consideration that defendant assumed to pay and discharge the incumbrances on said lots. That after the agreements were so made, and the consideration, other than the payment of the incumbrances on the lots, paid by defendant, the defendant drew up a deed for said property containing the agreement as to the discharge of the incumbrance as aforesaid, but that in said deed the name of grantee was left blank; that defendant requested the plaintiff to execute said deed with the blank therein as aforesaid; that the plaintiff consented to so execute said deed, provided the defendant would agree to fill the blank with the name of a solvent and responsible purchaser. That the defendant so promised, and that plaintiff then executed said deed and delivered it to defendant. That defendant, in violation of his agreement, without the knowledge or consent of plaintiff, filled said blank with the name of one Peter Boyce of Arkansas, who was unknown to plaintiff, and utterly insolvent then and has been ever since; that neither said Boyce nor defendant has ever discharged or paid off any of the incumbrances aforesaid, but suffered said lots to be sold under and by virtue of the same, for a sum insufficient to pay the same, by means of

which plaintiff was compelled to and did pay off, as the remainder of said incumbrances, the sum of \$863, for which plaintiff prayed judgment.

The defendant in his answer denied the facts of the petition and charged that he had sold the lot as the agent of plaintiff, and that plaintiff knew that the deed was to be filled up with the name of Boyce, and that he was as well acquainted with Boyce as defendant was, and consented to have the blank filled with his name.

A jury was waived and the cause submitted to the Court for hearing. Each party introduced evidence tending to prove the issues on his respective part. The defendant objected to the evidence of plaintiff in reference to the deed having been executed in blank, and also objected to the deed as evidence, on the ground that a deed executed in blank as to the name of the grantee and filled up by verbal authority, was absolutely void. The Court overruled the objection and the defendant excepted.

At the close of the evidence the Court at the instance of the plaintiff declared the law to be as follows :

"If the Court sitting as a Jury, believe and find from the evidence that the plaintiff executed a deed for the premises in the petition described, leaving the name of the grantee blank ; that such deed contained covenants on the part of the grantee, as part of the purchase money, to discharge certain incumbrances for which the plaintiff was personally liable ; that the defendant expressly promised to plaintiff to fill the blank with the name of a solvent person before delivery, and thereafter filled said blank with the name of an insolvent person and delivered it as the deed of plaintiff, in consequence whereof the plaintiff was damaged, then the plaintiff is entitled to recover in his action, and it is immaterial whether defendant did or did not know the insolvency of such person, if he could have ascertained the same by exercise of reasonable care and diligence."

The Court declared the law at the request of the defendant that "If the deed from the plaintiff to Boyce was a valid deed

and its covenants binding upon the grantee therein, and if the defendant filled the blank for the grantee's name at the request of the plaintiff to fill the same with the name of a solvent person and then deliver the deed to that person, yet, the defendant is not liable for any damage resulting to the plaintiff because of the insolvency of the said grantee, if it appear in evidence that the defendant made inquiry and used reasonable diligence to learn the condition of said grantee as to solvency, and had reasonable ground to believe the said grantee to be solvent at the time the said blank was so filled, and the plaintiff cannot recover."

The following declaration of law was refused by the Court and the defendant excepted: "The Court declares the law to be, that if the deed offered in evidence by plaintiff was executed by him in blank as to the grantee; that after its execution he delivered it to the defendant with instructions to the defendant to fill in the blank with the name of a solvent person and the defendant filled in the name of an insolvent person, and then delivered the deed to that person, the deed was void, and the grantee therein named was not bound by any of its covenants or recitals, and the plaintiff cannot recover, unless it appear from the evidence that the defendant was duly empowered by writing under seal, duly executed according to the requirements of law, to fill said blank."

The defendant also excepted to the opinion of the Court in giving its first declaration of law asked for by the plaintiff.

The Court found the issues for the plaintiff and rendered judgment in his favor for \$579.

The defendant in due time filed a motion for a new trial, setting forth as cause therefor the opinions of the Court excepted to. This motion being overruled defendant excepted and appealed to the General Term of the St. Louis Circuit Court, where the judgment of the Special Term was affirmed, from which last judgment he appealed to this Court.

The defendant and appellant raises several objections to the rulings of the Court upon the trial of this cause, and also objects to the sufficiency of the petition filed by the plaintiff in

the cause. But all of these objections resolve themselves into one and the same objection, stated or made in a different form. No demurrer was filed in the case but an answer was filed taking issue upon the facts stated in the petition. It is however contended that an objection may be made to the petition, or advantage may be taken of the insufficiency of the petition, by objecting to the evidence in support thereof on the trial. This is very true, that in a proper case where no cause of action is stated in the petition, the defendant may object to any evidence being introduced in the cause on that ground. (*Syme vs. St. Bt. Indiana*, 28 Mo., 335.) The only ground on which the evidence in this case was objected to, was an objection to the evidence of the plaintiff in reference to the deed having been executed in blank, and defendant also objected to the deed as evidence, on the ground that a deed executed in blank as to the name of the grantee, and filled by verbal authority from the grantee was void; nothing is said in the objection about the insufficiency of the petition. It is true that if such a deed would be absolutely void, the petition would be defective, and hence, I say that the objections and exceptions made and taken in this case, whether as to the admissibility of evidence, or as to giving or refusing of instructions, or to the refusal of the Court to sustain defendant's motion for a new trial, all resolve themselves into one objection which is called by the defendant's attorney, the central question in the cause, and it might have been said the only question in the cause. This question is as to whether a deed regularly executed in other respects, with a blank left therein for the name of a grantee, and placed in that condition in the hands of a third person with verbal authority, (but no authority under seal,) from the person who executed it to fill up the blank in his absence and deliver the deed to the person whose name is inserted as grantee, and when said deed is so filled up and delivered, whether the same is void. If such a deed is held to be valid, then the objections to the petition, to make the most of them, are merely technical, and the petition would be good at least after verdict; but if said deed would be absolutely

void, then objection to the evidence was well taken, and the first instruction was improperly given and the instruction refused was improperly refused, so that, as before said, all of the points made in the case resolve themselves into the one single point.

It is stated by the defendant's counsel, that the authorities in the different States of the Union are conflicting on this subject and not easy to be reconciled, and that the question is a new one in this State.

I will make no attempt at a review of the authorities on this subject. In the case of *Drury vs. Foster*, 2 Wallace, 24, the question involved in this case was fully argued and examined. In that case, a mortgage had been executed in blank both as to the name of the mortgagee and the consideration, (the mortgage was to convey the separate property of a married woman) which was afterwards filled up in her absence by her husband. This deed was held to be void, but its invalidity was placed on the grounds that the woman "was disabled in law from delegating a person, either in writing or by parol, to fill up the blanks and deliver the mortgage." But Justice Nelson in his opinion says: "We agree that if she was competent to convey her real estate by signing and acknowledging the deed in blank and delivering the same to an agent, with an express or implied authority to fill up the blanks and perfect the conveyance, its validity could not well be controverted. Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is that the power is sufficient." In a late case decided by this Court, this language of Justice Nelson is referred to or quoted with approval and fully recognized. (*Burnside vs. Wayman*, 49 Mo., 356.) So that although the authorities are somewhat conflicting in this country, on this subject, this Court has fully recognized the validity of deeds executed as the one in this case. It follows, that the declarations of law as given by the Court were properly given, and the declaration refused was properly refused.

Hoffelman, et al. v. Frank.

Judge Sherwood not sitting. The other Judges concurring, the judgment of the Circuit Court at General Term is affirmed.

—o—

FREIDA HOFFELMAN *et al.*, Respondents, *vs.* GEORGE FRANK,
Appellant.

1. *Practice, civil—Bill of exceptions—Filing after the proper time—Supreme Court.*—The Court will not notice a bill of exceptions filed after the proper time.

Appeal from St. Louis Circuit Court.

Thomas S. Espy, for Appellant.

Appellant filed an elaborate brief, but it is necessarily omitted here, because the Court does not pass upon the points discussed therein.

WAGNER, Judge, delivered the opinion of the court.

In this case the Court at General Term dismissed the appeal taken from the judgment at Special Term, and the defendant has prosecuted his appeal to this Court. Upon looking into the record, we find that there is no bill of exceptions that we can notice. The motion for a new trial was overruled on the 13th day of October, 1871, and time during the term was granted to file the bill of exceptions, and afterwards two extensions of time were given for filing the same; the first till December 30, 1871, and the second till January 1st, 1872. But the Bill was not filed till the 26th day of January 1872, being twenty-five days after the time stipulated. It was then filed without any authority whatever, and we cannot therefore notice it. Hence there is nothing in the record to review.

Let the judgment be affirmed. The other Judges concur.

Boatmen's Savings Institution, v. Mead, Administrator.

BOATMENS SAVINGS INSTITUTION, Respondent, vs. ANDREW W. MEAD, administrator of TURNER MADDOX, Appellant.

1. *Bills and Notes--Partnership--Death of partner--Renewals--Liability of estate of deceased.*--A. died, leaving the firm of which he was a member indebted to B. which debt was witnessed by notes. These notes were afterwards given up and other notes in renewal thereof taken, but the creditor stipulated, that such action should not discharge the estate of A. *Held*, that A.'s estate was still liable either as on a balance of the original debt, or of the surrendered notes

Appeal from St. Louis Circuit Court.

Cline, Jamison & Day, for Appellant.

The original notes having been procured by the respondent by purchase, the respondent never had any claim against the firm of D. T. Wright & Co., at any time except *upon* the *various notes* taken by it and no claim is based upon these notes or any of them, none of them having been either produced or offered in evidence, so that the plaintiff never in fact *showed any ground of recovery against* the estate of Maddox.

A renewal of notes by Banks is a payment and satisfaction of the old notes. (2 Parsons on Notes and Bills 203.)

Lackland, Martin & Lackland, for Respondent, relied on, *Powell vs. Charless*, 34 Mo., 485.

ADAMS, Judge, delivered the opinion of the court.

The plaintiff presented a demand against the estate of Turner Maddox deceased, in the Probate Court of St. Louis County, which was allowed, and the defendant as administrator appealed to the Circuit Court, where judgment was again rendered in favor of the plaintiff at Special Term, and affirmed at General Term, and the defendant has appealed to this court.

The following is a copy of the demand as presented by plaintiff:

ESTATE OF TURNER MADDOX, deceased.

"To Boatmens Savings Institution Dr.

For amounts loaned to D. T. Wright & Co., at a time when Turner Maddox was alive and a member of said firm.

 Boatmen's Savings Institution, v. Mead, Administrator.

Debits.

Note due Nov. 5th, 1869, for money loaned.	\$6,000.00
“ “ Dec. 6th, “ for money loaned.	\$3,000.00

Total	\$9,000.00
-------	------------

Less part payment July 13th, 1870, at which time the extension of balance was made, amounting to \$8,500, and to which time also interest on \$9,000 was paid

 \$500.00

 \$8,500.00

Interest on same from July 13, 1870, to date say 11 months and 15 days at 6 per cent.

 \$488.75

 \$8,988.75
Credits.

Paid 1 note of \$1,000 July 23, 1870	\$1,000
“ Interest to date 335 days at 6 per cent.	55.83
“ 1 note of \$1,000 Aug. 24, 1870	\$1,000
“ Interest to date 304 days at 6 per cent.	50.67
“ 1 note \$1,500 Sept. 23, 1870	\$1,500
“ Interest to date 275 days at 6 per cent.	48.75
“ 1 note of \$1,000 Oct. 27, 1870	\$1,000
“ interest to date 246 days at 6 per cent.	41
“ 1 note of \$1,000 Nov. 23, 1870	\$1,000
“ Interest to date 215 days at 6 per cent.	\$35.84
	<hr/> \$5,752.09

Balance this day	\$3,236.66
------------------	------------

St. Louis, June 28, 1871,

W. A. Clendenin, Discount Clerk."

Interest to April 3, 1871	\$148.80
---------------------------	----------

 \$3,385.46.

On the trial of the case the plaintiff introduced evidence, conducing to prove his demand as stated,—that the money was loaned to D. T. Wright & Co., of which firm Turner Maddox was a member, and notes as set forth were discounted for the loans, which were renewed from time to time by discounting the renewal notes up to the death of Turner Maddox,—and after his death notes were given by the surviving firm as renewals, and at the time this was done it was agreed, that such renewal notes were not to be considered as payment of the notes then due, although such note was given up; it was understood that the plaintiff was to hold the estate of Turner Maddox for the amount of the surrendered notes.

Evidence was also given on the part of the defense conducing to show, that renewal notes were discounts or purchases of the notes taken in renewal. But there was no evidence contradicting plaintiff's evidence in regard to holding Turner Maddox's estate liable for the amount due at the time of his death.

At the trial the plaintiff offered to surrender the unpaid notes, given in renewal after Turner Maddox's death.

It is very manifest from the foregoing facts, that at the time of Turner Maddox's death he was indebted to the plaintiff for the note then existing, and that he so remained indebted as a member of the firm of D. T. Wright & Co. after his death. This debt was not extinguished or paid off by the renewal notes given by the surviving partners after the death of Turner Maddox, as it was expressly understood that such renewal notes were not to be considered as payment or as a release of his liability. As his estate still owes a balance on that note it is wholly immaterial to the estate, whether such balance be considered as part of the original loans or not. It is sufficient, that the balance of the debt still exists, whether in the one shape or the other. The proceedings in the Probate Court are not subject to the technical rules of pleading.

The plaintiff's demand, as stated and presented for allowance, may be treated either as a balance of the original loans or as a balance of the surrendered note due at the death of

Turner Maddox. The evidence presented it in both shapes, and the instructions given for both parties covered all the points raised or relied on by the either side.

The judgment was for the right party, and is a complete bar to any other claim by the plaintiff against Turner Maddox's estate growing out of these transactions.

Judgment affirmed. Judge Sherwood absent. The other judges concur.

—o—

CENTRAL SAVINGS BANK, Appellant, *vs.* ANDREW W. MEAD,
Admr. of Turner Maddox, Respondent.

1. *Bills and notes—Renewal by surviving partner—Protest.*—A., B. and C. while partners indorsed certain promissory notes, A. died before the notes matured. At the maturity of the notes, part of the amount was paid by the maker, and renewal notes were given for the remainder, which were indorsed by B. and C., with the former firm name, and the original notes were surrendered up to the makers and destroyed. The original notes were not protested, nor were any steps taken to hold A.'s estate upon them. *Held*, that A.'s estate would not be held liable for the amount unpaid on the original notes, nor on the renewal notes; and it makes no difference that the holder of the notes had an understanding with B. and C., that the renewal notes were not taken in satisfaction of the original debt.

Appeal from St. Louis Circuit Court.

Bakewell & Farish, for Appellant.

I. The notes given in renewal of the original notes maturing next after Maddox's death, were not given or accepted in satisfaction or extinguishment of the original notes, but with the understanding that all the parties originally liable should remain bound for any unpaid part thereof. (Powell vs. Charles' Exr., 34 Mo., 483.)

II. In view of and under the attendant and peculiar circumstances of the case, it was not incumbent on the plaintiff to demand payment of the notes next maturing after Maddox's death, and give notice of non-payment in order to hold the estate of Maddox. In this case it should be borne in mind

that the indorsers were a firm composed of Maddox, Wright and Moore. That though after Maddox's death they could make no new note that could bind Maddox, yet as surviving partners, a notice to them of the maker's failure to pay, would be sufficient in law to bind the old firm, or the waiver by them of demand and notice would be equally binding. The indorsement of the firm was an act joint in its nature, and created a joint liability, and though death had worked a dissolution of the firm, the character of the liability still continued, and in order to fix such liability it was sufficient that the surviving members of the firm should be affected with notice.

Again, the part payment and renewal, though it was no extinguishment of the original demand, was such compliance with the obligation as if sanctioned or adopted by the indorser, would make him liable; such acquiescence the surviving partners had a right to give, not only for themselves but for the deceased partner. If they could have paid the whole or any part, and had claim for contribution, they could accept part payment that inured to the benefit of all.

Cline, Jamison & Day, for Respondent.

The firm of which Maddox was a member, was never in any way liable to the plaintiff except as accommodation indorsers. And that liability could be turned into an indebtedness only by the protest of the note or a waiver of such protest. But nothing of that kind was done, but the notes were surrendered up by the bank to Morrison & Co., at their maturity. If deceased was liable on such notes, then the suit should have been based upon them as being plaintiff's cause of action,—and the liability of Maddox as an indorser established.

That Maddox is not liable on the notes sued on, and given in evidence in the case, all of which were made after Maddox's death, cannot certainly require any argument.

A surviving partner cannot bind a deceased one by becoming an accommodation indorser.

EWING, Judge, delivered the opinion of the court.

This is a suit on four promissory notes executed by Wm.

Morrison & Co., and indorsed by D. T. Wright & Co., bearing date respectively, Sept. 26, 1870; October 31, 1870; November 5th, 1870, and December 7th, 1870.

The petition alleges that Maddox in his life time was a member of the firm of D. T. Wright & Co., and he died in October 1869; that prior to that time plaintiff had loaned to Wright & Co., and Wm. Morrison & Co., on the notes of the latter which were indorsed by Wright & Co., \$19,000. That subsequently, at the maturity of the notes, said Wm. Morrison & Co., and D. T. Wright and E. H. Moore, surviving partners and still prosecuting business under the style of D. T. Wright & Co., renewed the notes by paying a portion of the principal and interest; that these renewals were continued from time to time upon payment of the interest and part of principal at each renewal, until the debt was reduced to \$8,800, for which sum the notes described in the petition were given. That as said notes matured, D. T. Wright & Co. waived in writing demand of payment, notice, &c., except as to one of them, which was duly protested for non-payment and notice thereof given; that these several notes were renewals of the notes falling due next after the death of said Maddox, and that they were not taken in payment and satisfaction of the notes indorsed by D. T. Wright & Co., during the life of said Maddox.

The answer of the administrator was a denial of any knowledge respecting the matters stated in the petition. There was a judgment for the defendant, which being affirmed at General term, the cause is brought here by appeal. It appears from the evidence, that the firm of D. T. Wright & Co., was originally composed of D. T. Wright, E. H. Moore and Turner Maddox deceased; that while Maddox was alive the firm indorsed certain notes for the accommodation of Wm. Morrison & Co., the makers, which matured after the death of Maddox and were never protested; that after Maddox's death Wright and Moore still continued business in the firm name of D. T. Wright & Co., that Morrison & Co., paid something on said notes, and executed new notes with D. T.

Wright & Co., as indorsers, that firm being then composed of Wright and Moore; that these notes were renewed from time to time by Morrison & Co., with the same indorsers, partial payments being made on each renewal and the notes sued on being the last renewal. It also appeared in evidence that the old notes as they were renewed were surrendered by the plaintiff to Morrison & Co., and were destroyed by them; that they were sometimes marked paid, by the teller of the bank, and at other times not. The President of the bank testified that the notes given in renewal were not taken in payment and satisfaction of the notes due next after the death of Maddox; that the board accepted part payment and a renewal as to the balance, with the understanding with Wright that the new notes were not taken in payment or extinguishment of the original ones, but that they intended still to hold the estate of Maddox liable.

The mere statement of the facts shows that the case is without merit. The firm, of which Maddox was a member, were indorsers for the accommodation merely of Morrison & Co., and their liability was of course conditional; the notes so indorsed matured after the death of Maddox; were never protested, and none of the steps usual in such cases were taken to make the estate of Maddox liable upon his indorsement. On the contrary, new notes were executed by Morrison & Co., to the plaintiff, and indorsed by Wright and Moore, the surviving members of the firm; and the old notes surrendered to the makers Morrison & Co., and by them destroyed.

Any understanding between the plaintiff and Wright when the new notes were given, after the death of Maddox, to the effect that they were not taken in satisfaction of the original debt, and that plaintiff would hold the estate of Maddox liable therefor, could not bind the estate. He had no authority to enter into any such agreement. Had Maddox been living and the partnership still existing, there would have been no implied authority on the part of Wright to bind him in a transaction of this character unconnected with the partnership.

Judgment affirmed. The other Judges concur, except Judge Sherwood who is absent.

In re Lewis.

IN MATTER OF ACCOUNT OF JOHN LEWIS, CLERK OF CIRCUIT
COURT OF ST. LOUIS COUNTY, Appellant.

1. *Circuit Clerks—Fees—Excess of, over salary—Must be paid into county treasury whenever collected.*—The fees collected by the clerk of a Circuit Court, which are in excess of the salary allowed by law, must be paid into the county treasury whether they are collected before or after his term of office expires.

Appeal from St. Louis Circuit Court.

S. Reber, for Appellant.

Thos. C. Reynolds, for St. Louis County.

ADAMS, Judge, delivered the opinion of the court.

John Lewis, the appellant, is clerk of the St. Louis Circuit Court and is his own successor, having served out his previous term which ended the 31st day of December, 1870. After the end of the year 1871, he delivered to the Judges of the Circuit Court two statements of his accounts verified by his affidavit. One statement consists of fees and emoluments for services rendered prior to his second term, which showed a balance in his hands of \$13,892.16. The other statement showed a total amount of receipts for the first year of his second term to be \$16,325.14.

These statements were made under section 24 of Article 6 of the Constitution and the Act of the Legislature of 1868 (Session Acts 1868, p. 5) to carry into effect that provision of the Constitution.

The court audited these accounts and allowed the clerk \$24,242.45 to pay his deputies and assistants for the year 1871, which was in excess of the receipts of that year \$7,917.30. This excess was allowed to him out of the fees and emoluments remaining in his hands of his previous term, and also his salary of \$2,500.00 which still left in his hands \$3,474.85 of the emoluments and fees of his previous term, and this amount the court ordered him to pay into the County Treasury of St. Louis County within ten days, and from this order the plaintiff Lewis has appealed to this court.

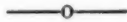
The objection urged by the clerk is that he is not liable for any fees collected after the expiration of his previous term for

services rendered during that term. The spirit and meaning of the Constitutional provision and the statute of 1868 enacted to put it in force, are that the clerk must account for all fees and emoluments over and above a sufficiency to pay his deputies and assistants and his own salary.

The law requires him to make out verified statements within thirty days after the expiration of each year. If he fails to do this, he renders himself liable to certain penalties, and the court may on its own motion proceed to ascertain the state of his accounts and order such balances as may be found to be paid into the County Treasury. This may be done after the expiration of the term, whether he be his own successor or not.

As the clerk voluntarily made the statements in question, the court had the power to act on them and to ascertain the true balance in his hands, and to order it to be paid into the County Treasury.

I see no error in the record. Let the judgment be affirmed. Judge Wagner absent. The other Judges concur.



HENRY DISSE, Respondent, *vs.* JACOB FRANK, Appellant.

1. *Practice, civil—Supreme Court—Submission on record.*—A cause cannot by agreement be submitted to this Court on the record. The law requires that a statement and brief be filed.

Appeal from St. Louis Circuit Court.

WAGNER, Judge, delivered the opinion of the court.

In this case the only paper filed is a stipulation by the attorneys, by which they agree to submit the case for decision upon the record. This practice cannot be endured. As they have entirely failed to comply with the law in filing a statement and brief, the appeal will be dismissed.

The other Judges concur, except Judge Sherwood, who is absent.

Provident Savings Institution, v. The Jackson Place Skating and Bathing Rink.

THE PROVIDENT SAVINGS INSTITUTION, Respondent, *vs.* THE JACKSON PLACE SKATING & BATHING RINK, HENRY S. PARKER, Stockholder, Appellant.

1. *Corporations—Stockholders—Constitution—Individual Liability—Repeal—Obligation of contracts.*—The amendment to the Constitution of Missouri adopted Nov. 8th, 1870, which repealed the 6th section of Art. 8th of the then existing Constitution, whereby stockholders in corporations became liable for double the amount of stock they owned, and declared that all laws, ordinances and provisions inconsistent with said amendment should be forever abolished and of no effect, did not have the effect of removing the individual liability of one who was a stockholder when the debt was incurred and also when the execution was issued against the corporation. Giving this amendment such effect would make it impair the obligation of contracts, because first the creditor contracted with the corporation on the faith of the individual responsibility of the stockholders, and second, the remedy is so seriously affected that the obligation is impaired.

Appeal from St. Louis Circuit Court.

M. L. Gray, for Appellant.

I. The adoption of the constitutional amendment on 8th Nov. 1870, had at least the effect to take away the special, summary, statutory remedy by motion for execution against a stockholder. The remedy may be changed without impairing the obligation of a contract. (4 Wheat., 200, 245; Cool Const. Lim., 286-7-8, 361, *et seq.*; Sedg. Stat. & Const. Law. 643.)

The remedy against a stockholder by a summary motion was clearly in the power of the Legislature to change and take away, and taking this summary remedy away, does not in any way impair the obligation of the contract.

II. The amendment of 8th Nov. 1870, to the Constitution clearly declares that thereafter in no case should a stockholder be individually liable over and above the amount of the stock owned by him. This amendment is not unconstitutional. "The debt is the debt of the corporation and not of the individual stockholder." (McLaren, *et al.* vs. Franciscus, *et al.*, 43 Mo., 465.)

III. Under our statute the creditor of the corporation gets no claim on the stockholder at the time of the contract, but gets such claim on the return of an execution "*nulla bona.*"

Provident Savings Institution, v. The Jackson Place Skating and Bathing Rink.

When that time came in this case the amendment of the Constitution declared no such claim existed.

Hitchcock, Lubke & Player, for Respondent.

I. The note upon which respondent obtained the judgment against the Jackson Place Skating and Bathing Rink, under which the motion in question was made, was executed February 10, 1869, and while the double liability clause was in force as a part of the Constitution of this State.

Although this clause was repealed in November, 1870, and before respondent obtained judgment, such repeal can not affect the rights of respondent which accrued while said clause was in force.

If the repealing amendment purported to affect such rights, it would be unconstitutional and void under Sec. 10 of Art. I, of the U. S. Constitution. (*Hawthorne vs. Calef*, 2 Wal. U. S., p. 10 and cases cited.)

II. But it does not purport to affect such rights. (1 W. S., Ed. of 1872, p. 66 *a*.)

WAGNER, Judge, delivered the opinion of the court.

From the record it appears that plaintiff brought suit on the 18th of March, 1870, against the Jackson Place Skating and Bathing Rink, a Corporation created under the General Corporation Laws of this State.

Judgment was rendered in said suit in October, 1871, in favor of plaintiff, and against defendant, and execution was duly issued, and on the 4th day of December, 1871 the same was returned unsatisfied. Parker, the defendant, was a stockholder at the organization of the Skating and Bathing Rink Company, and continued to be one at the time of the issuance of the execution, holding two shares of one hundred dollars each. When the execution was returned "no goods or chattels found of the defendant whereon to levy," a motion was made for the issuance of an execution against Parker for an amount equal to his two shares. This motion was granted and an execution ordered, and from that action of the Court, Parker appealed.

Provident Savings Institution, v. The Jackson Place Skating and Bathing Rink.

The position is now taken by the appellant, that at the time the execution was returned and the order granted against him, the double liability clause in the Constitution was repealed, and that therefore there was no authority for the proceeding. He assumes that the Statute which provided for executing the Constitutional clause, and the remedy given thereunder were swept away by the amendment adopted in November, 1870, and consequently that the Court could not proceed thereafter under its provisions.

The amendment repealed the 6th Section of the 8th Article of the Constitution, which provided that stockholders in corporations should be liable for double the amount of stock they owned, and declared that all laws, ordinances and provisions inconsistent with the amendment should be forever abolished and be of no effect. If this amendment had the operation ascribed to it, then it cut off the creditors from all remedy against the stockholder, for it purports to repeal all laws and provisions which were made for enforcing the clause as it existed in the Constitution. It is not a question of a mere change of remedy, but it amounts to a destruction of all remedy.

A case entirely similar to this, arose in the State of Maine, and was finally decided in the Supreme Court of the United States.

The State of Maine incorporated a Railroad Company, the Charter providing that the shares of the individual stockholders should be liable for the debts of the corporation; and in case of deficiency of attachable corporate property or estate, the individual property or rights and credits of any stockholder were to be liable to the amount of his stock, for all debts of the corporation contracted prior to the transfer thereof, for the term of six months after judgment recovered against the corporation, and the same was to be taken in execution on said judgment in the same manner as if said judgment and execution were against him individually, or the creditor after the judgment might have his action on the case against the individual stockholder, but the stockholder was

Provident Savings Institution, v. The Jackson Place Skating and Bathing Rink.

not to be liable beyond the amount of his stock. Another section provided that if sufficient corporate property to satisfy the execution could not be found, the officer having the execution should certify the deficiency on the execution, and give notice thereof to the stockholder whose property he was about to take; and if such stockholder should show to the creditor or officer sufficient attachable corporate property to satisfy the debt, his individual property, rights and credits should thereupon be exempt from attachment and execution.

The plaintiff in the case, who had supplied the corporation with materials to build the road, having obtained judgment against it and being unable to get from it satisfaction, sued the defendant who was a stockholder both at the time when the debt was contracted and when judgment was rendered, and no transfer of whose stock had been made. A few months after the debt was contracted the Legislature of Maine passed a Statute, repealing the individual liability clause of the Charter.

On the case coming before the Supreme Court of the State, that Court decided that while, but for the repealing act the plaintiff would have been entitled to recover of the stockholder individually to the extent of his stock, yet the repealing act had taken away and destroyed such right.

On Error to the Supreme Court of the United States (Hawthorne vs. Calef, 2 Wall., 10;) the judgment was reversed, and it was held that the State Statute repealing the former Statute which made the stock of the stockholders in the Chartered Company liable for the corporation's debts, was, as respected creditors of the corporation existing at the time of the repeal, a law impairing the obligation of contracts and void. The decision was based on two grounds. First, that the creditor contracted with the corporation on the faith of the individual responsibility of the stockholder, and the repealing statute withdrew that security, and secondly, that the remedy was so seriously affected that the obligation was greatly impaired.

The above case was decided by the Court of last resort for

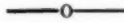
Jefferson Mutual Fire Insurance Company, v. St. Mary's Seminary.

the final settlement and adjudication of questions of this character, and is binding authority.

The facts in the two cases are almost identical. Here the defendant was a stockholder when the liability was incurred by the corporation, and never transferred his stock, but held it when the execution was returned and when the repealing clause was adopted.

The only question then is whether that repeal released him. We are of the opinion that it did not.

The result therefore is, that the judgment must be affirmed. The other Judges concur, except Judge Sherwood who is absent.



JEFFERSON MUTUAL FIRE INSURANCE COMPANY, Respondent,
vs. ST. MARY'S SEMINARY, Appellant.

1. Washington Mut. Fire Ins. Co. *vs.* St. Mary's Seminary, *ante*, p. 480 affirmed.

Appeal from St. Louis Circuit Court.

Daniel Dillon, for Appellant.

W. H. Horner, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This case is on all fours with that of the Washington Mutual Fire Insurance Co., decided at the present term, and for like reasons the judgment herein will also be affirmed. Judge Wagner absent. The other Judges concur.

Provident Savings Institution, v. The Jackson Place Skating and Bathing Rink.

PROVIDENT SAVINGS INSTITUTION, Respondent, *vs*, The JACKSON PLACE SKATING AND BATHING RINK—BENJAMIN HORTON Appellant,

1. *Corporations—Double liability of stockholders—Transfer of stock.*—A stockholder cannot escape his liability under the former double liability clause of the constitution of the state, by transferring his stock in the corporation to an insolvent, or with a view of exonerating himself from his personal responsibility

Appeal from St. Louis Circuit Court.

Seneca N. Taylor for Appellant.

Laws and amendments to constitutions touching remedies may be repealed or amended according to the will of the Legislature. (*Sturgis vs. Crowninshield* 4, *Wheat.* 122; *Cool-ey's Const., Lim.*, 286-7.)

Hitchcock, Lubke & Player for Respondents.

I. Although the double liability clause was repealed in November, 1870, and before respondent obtained judgment, such repeal cannot affect the rights of respondent which accrued while said clause was in force.

If the repealing amendment purported to affect such rights, it would be unconstitutional and void under Sec. 10 of Art. 1 of the U. S. Constitution. (*Hawthorne vs. Calef*, 2 *Wal.* 10.) But it does not purport to affect such rights. [*W. S.* (1872,) p. 66 a.]

II. Under the instruction given for appellant, the Court must have found either that Clark was insolvent at the time of the transfer, or that the transfer was a mere sham, and in either event it was void against plaintiff. (*McLaren vs. Franciscus*, 43 *Mo.* 452, *Angell and Ames on Corp.*, Art. 623.)

WAGNER, Judge, delivered the opinion of the court.

This case is the same in all particulars as the one of the same plaintiff's against Parker, previously decided at this term of the court, with the exception, that, before the judgment was obtained and the execution issued against the corporation, Horton had transferred his stock.

Provident Savings Institution, v. The Jackson Place Skating and Bathing Rink

It seems, that Horton owned three shares of one hundred dollars each: that at the time the transfer was made the Skating and Bathing Rink Co. was hopelessly insolvent: that the transfer was made for the nominal consideration of one dollar to one Clark, and the evidence strongly tended to show that Clark was also insolvent.

At Horton's request the court declared the law to be, that if he transferred his stock for a valuable consideration to Clark, and Clark was not insolvent at the time of the transfer, then the motion for judgment against him should be overruled. The Court refused the other instruction which he asked, and then found for plaintiff.

In *McClaren vs. Franciscus* (43 Mo. 452) it was held, that members of a corporation who would be liable, if they continued members, to the creditors of the corporation, would still be treated as members, if they had disposed of their interest to an insolvent, or with a view of exonerating themselves from their present responsibility.

In the case of *Miller vs. the Great Republic Ins. Co. et al* (50 Mo. 55) it was said, that where, before execution against a corporation, the stockholder honestly, and without any intention to defeat the creditors of the company, sold and transferred his stock, the mere fact that the purchaser was insolvent at the time was not sufficient to hold the stockholder liable for the debts.

The third instruction refused did not go far enough, according to the above authorities, and the others were all rightly refused, because they predicated irresponsibility on the constitutional amendment repealing the double liability clause. It is evident, that the court must have found, that Horton's transfer was a mere sham to avoid his liability to the creditors of the corporation. That finding we cannot disturb.

Judgment affirmed. The other judges concur, except Judge Sherwood, who is absent.

 Shepley, et al., v. Cowan, et al.

JOHN R. SHEPLEY, *et al.*, Trustees under will of Wm. M. McPherson, Respondents, *vs.* JOHN EPES COWAN, *et al.*, Appellants.

1. *Land and land titles—Acts of Congress of June 13th, 1812, and May 26th 1824, granting commons to the villages of St. Louis and Carondelet—Reservation of commons—Decision in case of Carondelet vs. St. Louis, (1 Black., 179.)* Under the acts of Congress of June 13th, 1812, and May 26th, 1824, the city of Carondelet claimed certain lands as commons, and it became the duty of the President of the United States to reserve said lands from entry or sale; and said lands were thus reserved from entry or sale from the passage of said act of June 13th, 1812, till the decision of the United States Supreme Court in the case of Carondelet vs. St. Louis, decided at December Term 1861, of that court. Proper entries of such reservation were made at the local land office of St. Louis which gave due notice to all persons, thereof. It is thus established that said lands were reserved from entry or sale down to the said December Term 1861, of the United States Supreme Court.
2. *Land and land titles—Act of Congress of September 4th, 1841—Act of the General Assembly of Missouri accepting grant—Selection of land under said acts—Reservation.*—Under section 8 of an act of Congress approved September 4th, 1841, entitled "an act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," it was provided that there should be granted to certain States, Missouri among the number, five hundred thousand acres of land for purposes of internal improvements, and provided that the selection of such land should be made from any public land, except such as was or might be reserved from sale by any law of Congress or proclamation of the President of the United States. The General Assembly of Missouri passed certain acts accepting the five hundred thousand acres of land and providing for its selection. In 1849 the Governor of Missouri selected for plaintiff a part of the land which under the act of Congress of June 13th, 1812 had been reserved from entry or sale, and which was so reserved until December, 1861. *Held*, that said land being so reserved from entry or sale at the date of such selection was not of the character intended to be granted in the 8th section of the act of Congress of September 4th, 1841 and was not embraced in that section, and therefore such selection was null and void and no title could pass thereby to the State of Missouri, and the State could therefore pass none to the plaintiff.
3. *Land and land titles—Statute, construction of—Granting words.*—A statute which provides that "there shall be granted," etc., does not have the effect of making a grant. No title passes by the force of the act itself, the words imply that some other act is to be passed, before the Government parts with the fee to lands which it is provided shall be granted.
4. *Land and land titles—Lists certified by the Commissioner of the General Land Office—Land reserved—Act of Congress of Aug. 3rd, 1854.*—The act of Congress of Aug. 3rd, 1854, provided that "in all cases where lands have been or shall be hereafter granted by any law of Congress to any one of the several

 Shepley, et al., v. Cowan, et al.

States or Territories, and when said law does not convey the fee simple title of such lands or require patents to be issued therefor, the lists of such lands which have been certified by the Commissioner of the General Land Office under the seal of said office, shall be regarded as conveying the fee simple of all the lands embraced in said lists that are of the character contemplated by such acts of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be null and void" etc. Under these provisions of said act, the Commissioner of the General Land Office issued under the seal of his office a certificate that the State had selected under the 8th section of the act of Congress of September 4th, 1841, certain land, which was reserved from entry or sale under the act of June 13th 1812, and was reserved from entry or sale at the time the certificate was dated, and which had been selected by the State of Missouri under the law of September 4th 1841, which excluded from such selection land which had been reserved from entry or sale. *Held*, that such certificate of the commissioner was null and void and conveyed no title.

- b. Limitation, statute of—Not only bars but transfers titles—Does not run against the Government.*—The statute of limitations is a statute of repose. It not only bars, but may transfer a title. The statute does not run against the Government.

Appeal from St. Louis Circuit Court

Britton A. Hill, for Appellants.

I. The State location by McPherson as agent for the State is void, for the following reasons:

(a.) It is not on land subject to sale or entry. The land was not public land in 1850, but was reserved from sale, entry or location, being a part of the commons of Carondelet, a Spanish village having commons and common fields, adjoining on the south the common fields of St. Louis, another Spanish village, now the city of St. Louis.

(b.) The grant was complete for these commons to Carondelet north of the village on the 13th of June, 1812, and vested the title in Carondelet. This is admitted in the record of the case of Carondelet vs. St. Louis, a part of this record. (Carondelet vs. St. Louis, 1 Black., 179; Bird vs. Montgomery, 6 Mo., 511; Chouteau vs. Eckhart, 2 How., 421, 450; Guitard vs. Stoddard, 16 How., 494; West vs. Cochran, 17 How., 416, 417; Carondelet vs. St. Louis, 25 Mo., 448; Milburn vs. Hor-tez, 23 Mo., 532; Same case, 1 Black, 595.)

II. It is therefore established by authority that these commons of Carondelet were not public land—were not subject to sale, entry, location, or pre-emption prior to 1862. (*Kissell vs. The Schools*, 18 How., 25.)

The State location of 1850 is therefore void, a nullity *ab initio*.

III. The act of 3rd of March, 1853, (vol. 10, U. S. Stat., p. 244,) gave the Chartrands the right to pre-empt this fractional section 9, if they were *settlers* before or after the date of that act, as soon as the Supreme Court of the United States declared the claim of Carondelet to the same land, as commons, invalid. They were *settlers* and cultivators both before and after the date of that act of Congress.

The Chartrand pre-emption and patent vested the title of the United States in the heirs of Thomas Chartrand on the 21st day of July, 1866, and no criticism of the validity of the pre-emption can be made by McPherson, who came in during the years 1848 or 1850, claiming adversely.

IV. The State location of McPherson in 1850 was invalid as against Chartrand's pre-emption, for the further reason that the act of Sept. 4, 1841 (5 U. S. Stat. 455), did not convey the fee to any lands whatever, but left the land system of the United States in full operation as to regulation of titles, so as to prevent conflicting entries. When the State of Missouri issued a patent to McPherson, the State had no title. (*Foley et al. vs. Harrison*, 15 How., 443-5, 450 (1853); *Wilcox vs. Jackson*, 13 Pet., 498; *Bagnell vs. Broderick*, 13 Pet., 436; *The Pacific Railroad vs. Lindell Heirs*, 39 Mo., 330; *Hannibal & St. Joseph Railroad vs. Moore*, 37 Mo., 338.)

V. The act of Congress passed August 3rd, 1854 does not help the plaintiff, for this land was not subject to location, entry or pre-emption in 1841, 1850, or 1854. The plaintiff, therefore, stands before the court without any title whatever from the United States or from the State of Missouri. (*Foley vs. Harrison*, 15 How., 443-4 to 451.)

VI. Plaintiff had no claim under the statute of limitations.

The pre-emption and patent both took effect in 1866, and

Shepley, et al., v. Cowan, et al.

from that time only can the limitations begin to run. This is the express doctrine held in the case of *Gibson vs. Chouteau* (13 Wallace.) Prior to the patent of 21st July, 1866, the title to this land was in the United States, and on that day, for the first time, the title vested in the heirs of Thomas Chartrand. (*Lythe vs. Arkansas*, 9 How., 314; *Foley vs. Harrison*, 15 How., 433; *Barnard vs. Ashley*, 18 How., 43.)

VII. The plaintiff asks the court to remove the defendants' title as a cloud upon his title. But the plaintiff has no title and never had any, and defendants' title is perfect under a possession commenced fifteen years before plaintiff's illegal State location was made. There is no equity in this bill to warrant the exercise of this jurisdiction. These two claimants are adverse, and the title of defendants is perfect, and no trust for plaintiff, or wrongful act of defendants, has been shown. No privities, confidence or relations of amity have been shown between these parties. Each claims, independently of the other, an adversary title; in such a case there is no cloud to be removed, but the question, in whatever form the action may be, is, which is the better title? •

The merits of the title must be first examined. If plaintiff has no title, and defendant has it, there is no cloud to be removed, but an actual title to be examined and its effect to be determined. The universal practice has been to try the legal title at law in such cases as this. (*Stoddard vs. Chambers*, 2 Mo., 284; *Stoddard vs. Mills*, 8 How., 345; *Bissell vs. Penrose*, 8 How., 317; *Barry vs. Gamble*, 3 How., 32.)

The plaintiff having a complete defense and remedy at law, if he have any title in the suits brought by defendants in ejectment against him for this land, has no right to file a bill in equity to test the question as to who has the better legal title. See the following cases in ejectment: (*Ballance vs. Forsyth*, 13 How., 18; *Bryan vs. Forsyth*, 19 How., 434; *Ballance vs. Forsyth*, *Id.* 183 (in equity); *Gregg vs. Forsyth*, Ejectment; *Kellogg vs. Forsyth*, *Id.*; *Dredge vs. Forsyth*, *Id.*; *Gregg vs. Tesson*, 1 Black., 150; *Kellogg vs. Forsyth*, 2 Black., 571.)

Whittelsey, for Appellants.

I. There is no equity in complainant's bill, to entitle him to the relief he seeks.

(a.) The plaintiff alleges himself to be in possession of the premises, holding under a complete legal title from the United States, to-wit: an entry and selection by the State of Missouri under the Act of Sept. 4th, 1841, properly certified by the Land Department, and a patent from the State. He holds, therefore, an apparently perfect legal title, older than defendant's patent issued in 1866.

Being in possession, he could have waited until sued in ejectment by defendants; or if defendants delayed suit, he could under the statute, have asked that defendants be required to bring suit in ejectment or show cause against it. (2 W. S., 1022, §§ 53, 54; Von Phul vs. Penn, 31 Mo., 333; Rutherford vs. Ullman, 42 Mo., 216.)

That was the only remedy to which he was entitled, upon the facts stated in his petition. Having the younger patent, the defendants could only recover against plaintiff's possession and older title, by showing an equity which antedated the plaintiff's patent. (Polk's Lessee vs. Wendall, 5 Wheat., 293; Ross vs. Borland, 1 Pet., 656; Minnesota vs. Batchelder, 1 Wall., 109.)

(b.) The bill shows no equity as a bill of peace, for it does not show that the matter of title has ever been tried at law, nor that the plaintiff has been harrassed by repeated actions, nor that it will avoid multiplicity of suits. (McCamant vs. Patterson, 28 Mo., 410; Marmaduke vs. Han. & St. Jo. R. R., 39 Mo., 545; 2 Sto. Eq., §§ 587, 589.)

(c.) It cannot be maintained on the ground of removing a cloud upon plaintiff's title.

A bill to remove a cloud cannot be maintained, where the title asserted to be a cloud, is adverse of itself; but only when the plaintiff's title is affected by some wrongful act, which may from failure of evidence in the future to show its illegality, becloud it. A positive adverse title is not a cloud, unless it be affected with some trust in favor of the title asserted by complainant. A reservation in a patent of all adverse rights,

Shepley, et al., v. Cowan, et al.

does not create a trust, so as to be a cloud upon an elder legal title, although the older might be a cloud upon the young patent. (2 Sto. Eq., §§ 700-708; Ward vs. Chamberlain, 2 Black., 430; Chipman vs. Hartford, 21 Conn., 488; Lockwood vs. St. Louis, 28 Mo., 20; Drake vs. Jones, 27 Mo., 428.)

The younger patent cannot becloud the title under the elder patent. (Ballance vs. Forsyth, 13 How., 18; S. C., 24 How., 183; Dredge vs. Forsyth, 2 Black., 563, 570; Bryan vs. Forsyth, 19 How., 334; Gregg vs. Forsyth, 24 How., 179; Gregg vs. Tesson, 1 Black., 150; Mehan vs. Forsyth, 24 How., 178; Maguire vs. Tyler, 40 Mo., 406, 439, 440.)

II. The complainant himself has no standing in court, for he presents a title which has no validity under the acts of Congress, as the selection was not authorized by law.

This will be evident from an examination of the statutes.

The act of Sept. 4, 1841, 5 Stat., L. & B's Ed., p. 455, § 8, provides for the selections to be made in the manner the State shall direct, to be "located in parcels conformably to sectional divisions and subdivisions of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale by any law of the Congress, or proclamation of the President of the United States, which said locations may be made at any time after the lands of the United States shall have been surveyed according to existing laws," &c.

This statute did not pass the fee from the United States. By statute, Aug. 3, 1854, c. 201; 10 Stat., 346, it was provided, "that the list certified by the Commissioner, should pass the fee of all the lands embraced in such lists, that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists, are not of the character embraced by such act of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby."

But this land had been originally included in the survey of

Shepley, et al., v. Cowan, et al.

the claim of Carondelet, by Rector, and the land was reserved from sale until that claim was finally decided, under the laws of the United States, by the Supreme Court, which was in January, 1862,—10 Stat., 244, ch., 143 ;—and until that claim was decided, the defendants had the right to complete their pre-emption, if their right originated before the selection of this land, by complainant, for the State.

T. G. C. Davis Esq., of counsel for Appellant Cowan, filed a brief discussing points involved in the case, which however, were not touched upon by the Court in its opinion, and the brief is therefore necessarily omitted.

Glover & Shepley, for Respondents.

I. That the Court of equity possesses the jurisdiction is unquestionable. "Where several parties set up conflicting claims to property with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts to litigate the conflicting claims." (*Garland vs. Wynn*, 20 How., 6; *Comegys vs. Vasse*, 1 Peters, 212; *Lytle vs. Arkansas*, 22 How., 202; *Harkness vs. Underhill*, 1 Black 316.) In case of disputed entries of land, equity has jurisdiction to set aside and correct any errors committed by the land officers. (*Lindsay vs. Hawes*, 2 Black, 554, 558.)

A court of equity will correct errors of law and fact in such cases. (*Minnesota vs. Bachelder*, 1 Wall., 109; *Silver vs. Ladd*, 7 Wall., 219; *Johnson vs. Towsley*, 13 Wall., 72.)

"The general rule is that when several parties set up conflicting claims to property with which a special tribunal may deal as between one party and the government regardless of the rights of others, the latter may come into the ordinary courts and litigate the conflicting claims." (*Garland vs. Wynn*, 20 How., 8.) In this case it is true, one party claims an equitable right only, but the court lays no stress on that. In *Barnard Heirs vs. Ashley*, 18 How., p. 43, there were two patents before the Court. The relief prayed was to cancel the defendant's patent. The defendant made his answer a

cross-bill, and prayed to cancel the plaintiff's patent. The court proceeded to hear the cause and maintained the jurisdiction. The Court fully considered both titles and passed on their respective merits and settled all controversy. If the principle contended for by the defendant is correct, the Barnard bill would have been dismissed for want of jurisdiction.

In *Lindsey vs. Hawes*, 2 Black, 554, the bill was filed by one having an equity only against the patentee. On page 558 the court say the quotation from *Garland vs. Wynn*, above, is the clearest statement of the rule of jurisdiction.

II. There is another ground of equity in the plaintiff's bill, independent of the power to correct errors of the land officers. We mean the jurisdiction to remove a cloud from the title of one in possession. (*Lyon vs. Hunt*, 11 Ala., 307; *Burt vs. Cassety*, 12 Ala., 740; *Ward vs. Ward*, 2 Haywood, 226; *Leigh vs. Everheart*, 4 Monroe, 380, p. 1; *Hamilton vs. Cummings*, 1 Johns. Ch., 517; *Apthorp vs. Comstock*, 2 Paige, 482; *Grover vs. Hugel*, 3 Russ. Ch., 432; *Hayward vs. Dimsdale*, 17 Vessey, 111; *Williams vs. Flight*, 5 Beavan, 41; *Ryan vs. McMath*, 3 Brown Ch., 14; *Jones vs. Perry*, 10 Yerger, 83.)

III. The lapse of time while the plaintiff has been in possession has extinguished all claims under the alleged pre-emption right. It is said, in answer to this, that the Supreme Court of the United States held in *Magwire vs. Tyler*, 8 Wall. 650, that *Magwire* had no right to sue till his land was surveyed and patented; no limitation would run. That is true, no one can be affected by an act of limitation till he can sue. But from the moment a pre-emption exists, the pre-emptor can sue (1 R. S., 1835, p. 134; 9 Mo., 794; 11 Mo., 585,) and from that moment limitation begins to run. One who has complied with the pre-emption law has a right of action; a right of possession is vested as soon as the facts exist.

Though the claim of the defendants has been extinguished, the facts exist *in pais*, and the patent seems to be a title in *Chartrand's* heirs, and remains a cloud on the plaintiff's title.

IV. M'Pherson's title to the land is as follows:

Shepley, et al., v. Cowan, et al.

"An act of Congress to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," was passed September 4, 1841. (5 U. S. Statutes at Large, p. 453.) Section 8 of this act granted 500,000 acres to the State of Missouri, to be selected as the Legislature should direct. The General Assembly of Missouri passed acts accepting said 500,000 acres and providing for its selection. (See said acts, approved March 27, 1843, p. 77; February 2, 1847, p. 88; March 13, 1849, p. 63; March 10, 1849, p. 61-65.) Surplus may be relinquished. December 15, 1849, the Governor of Missouri selected, for the plaintiff, fractional section 9, township 44, range 7, that being the land in dispute, and relinquished the surplus of 320 acres over 37 40-100 acres, the area of said fractional section 9. The plat of the United States survey of the tract was on file in the office of the register of lands in April, 1841. The selection of the tract by the Governor was approved by the Secretary of the Interior of the United States, January 17, 1850, and the land was patented to McPherson by the State of Missouri, February 27, 1850. This McPherson title is sixteen years older than the patent under which the defendants claim. The legal presumption favors this older title, and the burden of proof is on defendants to show that they have an equity, by virtue of the pre-emption laws, older than the plaintiff's patent; and there is no such equity.

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in equity commenced by William M. McPherson in April, 1870, and after his death revived in the names of his executors and trustees under his will.

The plaintiff claimed that he was the legal owner in fee of fractional Section 9, in Township 44, of Range 7 East, in the District of Lands subject to sale at St. Louis, Mo., which fractional section of land contained 37 40-100 acres.

The object of this action was to correct errors in law and fact by the officers of Land Office Department of the United States Government, in allowing the heirs at law of Thomas

Shepley, et al., v. Cowan, et al.

Chartrand Sr., deceased, to enter the land in dispute under the pre-emption laws, and to vest title in plaintiff.

This fractional section of land is situated between Carondelet and St. Louis, and under the Acts of Congress, of 13th of June, 1812, and the 26th of May, 1824, granting commons to the then villages of St. Louis, Carondelet, etc., Carondelet claimed this piece of land as a part of its commons, and under these acts it became the duty of the President of the United States, in the execution of the laws thereof, to cause the commons as claimed to be reserved from entry or sale.

The facts and proofs in this case, show that the Carondelet commons, including the land in dispute as part thereof, were thus reserved from entry or sale from the time of the passage of the Act of Congress, of the 13th of June, 1812, down to the decision of the Supreme Court of the United States at December Term, 1861, in the case of Carondelet vs. St. Louis, (1 Black. 179,) when for the first time it was released from the claim of Carondelet for commons, by the decision in that case. The Land Department of the United States Government had caused proper entries on the books of that department, at the local land office in St. Louis, to be made of this reservation, and this reservation was thus proclaimed to all persons desiring to appropriate any part of these commons, including the land in dispute. So when offers were made, as they were in several instances, to locate pre-emptions of this fractional section of land, they were uniformly refused by the local land officers on account of this reservation; and the acts of the local land officers were approved by the Land Office Department at Washington City. So there can be no dispute that the land in question was reserved from sale or entry up to the December Term 1861, of the Supreme Court of the United States.

By an Act of Congress entitled, "An Act to extend pre-emption rights to certain lands therein mentioned," approved, March 3, 1853, it was provided: "That any settler who has or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish or other grants, which have been or shall be hereafter declared by the Supreme Court of

Shepley, et al., v. Cowan, et al.

the United States, to be invalid, shall be entitled to all the rights of pre-emption granted by this act, and the act of 4th of September, 1841, entitled, 'An Act to appropriate the proceeds of the public lands, and to grant pre-emption rights' after the lands shall have been released from reservation, in the same manner as if no reservation existed." (10 U. S. Statutes at Large, 244.)

After the decision of the Supreme Court of the United States in *Carondelet vs. St. Louis*, the heirs of Thomas Chartrand, Sr., deceased, were allowed by the Land Department to prosecute the claim of their ancestor as pre-emptors on this fractional section of land, and after a contest lasting for several years before the Land Department, between these heirs and the plaintiff, a pre-emption was granted to them in June 1866, and a patent issued thereon in July, 1866.

A decree was rendered at Special Term in favor of the plaintiff, which was affirmed at General Term.

The plaintiff's standing in court first demands our attention; for, unless he has title himself, he has no right to question the claims of the heirs of Chartrand.

He assumes to stand here on a title derived from the State of Missouri, under the Act of Congress of September 4th, 1841, (5 U. S. Statutes at Large, p. 453,) entitled, "An Act to appropriate the proceeds of the sales of public lands and to grant pre-emption rights." Section 8 of this act provides, "That there shall be granted to each State specified in the first section of this act, five hundred thousand acres of land for purposes of internal improvements, &c." The State of Missouri is one of the States specified in the first section. The 8th section also points out how the lands are to be selected, and provides that the selection shall be made within the limits of the State, "on any public land except such as is, or may be reserved from sale by any law of Congress, or proclamation of the President of the United States," &c.

The General Assembly of Missouri passed acts accepting the five hundred thousand acres, and providing for its selection. (See said Acts, March 27, 1843, p. 77; February 2,

1847, p. 88 ; March 13, 1849, p. 63 ; March 10, 1849, p. 61-65.)

On December 15, 1849, the Governor of Missouri selected for plaintiff, fractional Section 9, Township 44, of Range 7, that being the land in dispute, containing 37 40-100 acres. The selection of this tract by the Governor was approved by the Secretary of the Interior of the United States, January 17th, 1850, and a patent for this fractional section was issued by the Governor of Missouri to McPherson, reciting the foregoing facts and granting the land to McPherson and his heirs, on the 27th day of February, 1850. This is the only paper title the plaintiff pretends to have for this land. It is obvious that the land in dispute, being at that time reserved from sale, was not of the character of the lands intended to be granted by the 8th section of the Act of Congress above referred to, and was not embraced in that section. That being the case, this selection in my judgment was perfectly null and void, and no title passed thereby to the State of Missouri, and the State could pass none to the plaintiff.

But independent of these considerations, the 8th section of the Act of Congress of September 4th, 1841, was not a *present* grant. It was not intended that any title should pass merely by force of the Act itself, and the selections to be made thereunder. The words are "there shall be granted" &c., and not a grant "*in presenti*." These words import that some other Act is to be passed by Congress before the General Government parts with the fee simple title. This point was expressly decided by the Supreme Court of the United States in *Foley vs. Harrison, et al.*, 15 How., 447. Speaking of this very Act, the Court says: "It could not have been the intention of the Government to relinquish the exercise of power over the public lands that might be located by the State. The same system was to be observed in the entry of lands by the State as by individuals, except the payment of the money; and this was necessary to give effect to the act and to prevent conflicting entries." The decisions of the Supreme Court of the United States in regard to Acts of Congress ought to be looked to by the State courts as controlling

authority. Whatever may be the rule in cases peculiarly cognizable by the State Courts, they must yield to that court where the subject matter in contest makes it the only court of last resort.

The case of *Foley vs. Harrison* was decided at the December Term, 1853. And afterwards, on the 3rd of August, 1854, Congress passed "An Act to vest in the several States and Territories the title in fee of the lands which have been or may be certified to them." It consists of a single section which reads as follows: "That in all cases where lands have been or shall hereafter be granted by any law of Congress to any one of the several States or Territories, and when said law does not convey the fee simple title of such lands or require patents to be issued therefor; the lists of such lands which have been or may hereafter be certified by the Commissioner of the General Land Office, under the seal of said office, either as originals, or copies of the originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such Act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such Acts of Congress, and are not intended to be granted thereby, said lists so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim or interest shall be conveyed thereby." (10 U. S. Statutes at Large, 346.)

This Act was no doubt intended by Congress as the means of passing the title in fee of the lands that had been selected by the several States under the Act of September 4th, 1841.

The record in this case shows that McPherson, after the passage of this Act, procured from the Commissioner of the General Land Office under his Seal of Office, the following certificate:

"General Land Office.

June 25th, 1855.

I, John Wilson, Commissioner of the General Land Office, do hereby certify that the State of Missouri selected under the

Shepley, et al., v. Cowan, et al.

8th Section of the Act of Congress entitled, "An Act to appropriate the proceeds of the sale of the public lands, and to grant pre-emption rights," approved September 4th, 1841, fractional Section nine in Township forty-four north of Range seven, east of the fifth principal Meridian, and that said selection has been approved to said State, according to law.

SEAL OF
U. S. GENERAL
LAND OFFICE.

In testimony whereof, I have hereunto subscribed my name and caused the Seal of this Office to be affixed, at the City of Washington, on the day and year above written.

John Wilson,
Commissioner of the General Land Office."

If this certificate was issued for the State of Missouri, and as a monument of its title to the land in dispute, under the Act of August 3, 1854, it must be construed in connection with that act, and the 8th section of the Act of September 4, 1841, and viewed in this light it demonstrates the nullity of the selection of the land in dispute, as that land had been reserved from sale and was not embraced in section 8, and such selection is declared by the Act of August the 3rd, 1854, to be "perfectly null and void," and that no right or title shall be conveyed thereby.

But if it be conceded that the certificate in question conveyed a title to the State of Missouri on the 25th of June, 1855, would such title pass to McPherson by virtue of his patent issued in 1850?

The Governor in issuing the patent could only do so in the execution of a statutory power, and the only title that could be conveyed was such as existed in the State at that time.

It is not a deed of conveyance purporting to convey an estate in fee simple absolute, but it recites the facts constituting the title of the State, and conveys that title and no other. An after acquired title by the State would not pass under that patent, if indeed there could be any conveyance made in any form by a sovereignty that could have the effect of passing to the grantee a title subsequently acquired.

I do not mean to be understood as intimating any opinion on this abstract question, I am however, clearly of the opinion that no after acquired title by the State could pass to McPherson under this patent, unless there be some statutory regulation to that effect, and none has been referred to, and I am not aware that any exists.

In the *City of Carondelet vs. McPherson*, 20 Mo., 92, it was assumed without investigation, that the title of the General Government to this fractional section of land had passed to the State of Missouri, under the act of September 4, 1841, and that the patent from the State to McPherson conveyed a complete title to him. The attention of the Court in that case was not called to the points of objection raised here, and therefore the intimation of Judge Gamble to the effect that a complete title had been conveyed to McPherson, can have no authoritative force in this contest and I merely refer to that case to show that it has not been overlooked.

There seems to be no light in which the facts of this case can be viewed so as to give the plaintiff a standing in Court.

He claims title by virtue of the statute of limitations. The statute of limitations in land contests is a statute of repose, and not only bars the title of the real owner but transfers such title to his adversary.

And therefore if the pre-emption claimed by the heirs of Chartrand had been completed and allowed for ten years, so that they could have maintained an action of ejectment on it against McPherson, during all that time their right would have been barred, and an affirmative right thereto would have vested in the plaintiff. Such affirmative title, or right, so created by adverse possession before the issuance of the patent by the United States, ought to be a sufficient transfer of the equity to authorize a decree for the legal title after the emanation of the patent.

It would be no interference with the primary disposal of the soil by the General Government any more than in a case where the pre-emptor himself had transferred his equity before the issuance of the patent. In either case the patentee

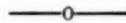
ought to be held as a naked trustee for the person holding the equity, whether transferred to him by contract or by the statutory bar. But there was no statutory bar in this case. The Chartrand pre-emption was not proved up or completed till June 1866. The plaintiffs' possession prior to this date could confer no title. The statute does not run against the Government; "*nullum tempus occurrit regi.*"

As these views dispose of this case, it is unnecessary to consider the other points so ably discussed by the learned counsel on both sides in making and repelling assaults on their respective positions.

The judgment must be reversed and the petition dismissed. Judge Sherwood absent, and the other Judges concur.

Since filing the foregoing opinion, the attention of the Court has been called to § 37 of Ch. 143, of the General Statutes 1865, by which an after acquired title by the State would pass to McPherson under his patent of 1850. But under the view taken by the Court the State never acquired any title whatever to the land in dispute, and therefore none passed to McPherson.

The Judgment therefore of this Court as rendered must stand. The other Judges concur.



STATE OF MISSOURI, *ex rel.* JOHN S. CAVENDER, Appellant, *vs.*
THE CITY OF ST. LOUIS, *et al.*, Respondents.

1. *Statutes, construction of—City of St. Louis, charter of—Opening streets—Assessment of benefits to the city.*—The provision of the charter of the City of St. Louis, providing that not more than ten per cent. of the benefits accruing from the opening of a street shall be assessed against the City, is valid. [Uhlig vs. City of St. Louis, 44 Mo., 458, affirmed.]
2. *Land Commissioner—Charter of City of St. Louis—Ordinance—Jury, selection of.*—The charter of the City of St. Louis provided that the benefits accruing from the opening of streets should be ascertained by the Land Commissioner by a jury, by proceedings prescribed by ordinance, and an ordinance of the City directed the Mayor of the City to furnish the Marshal summoning

State, ex rel. etc. v. The City of St. Louis, et al.

the jury, with the names of proper persons. *Held*, that a jury so procured was a legal jury, but the Land Commissioner was not required to receive such jurors, unless they were competent and qualified.

Appeal from St. Louis Circuit Court.

Samuel A. Holmes, for Appellant.

The obvious intention of the law, is to place with the Land Commissioner the selection and impanneling of the jury. (Sess. Acts 1870, p. 478, Art. 8, §§ 1, 2.)

The City Council had no power to deprive the Land Commissioner of the right of selection, and to vest it in the Mayor. Every party interested in the proceeding had the right to have the jury selected under the Land Commissioner's process, from the whole body of those qualified to serve as jurors. (People vs. Brighton, 20 Mich., 57; 8 Penn. St. R., 445; 18 Barb., S. C., 451; 16 Ohio, 181.)

E. P. McCarty, for Respondents.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding in the Circuit Court by *certiorari*, to correct certain alleged errors of the Land Commissioner of the City of St. Louis in the matter of opening Lucas Avenue. Some of the points argued by the counsel for the appellant in this court were not raised on record nor brought to the attention of the court below, and will therefore not be noticed here.

The only objections taken to the proceedings before the Land Commissioner, were: 1st. Because so much of the Act of the General Assembly, entitled "An Act to revise the charter of the City of St. Louis, and to extend the limits thereof, approved March 4th, 1870, as provides that the amount of benefits which may be assessed against said city shall not be more than one-tenth of the whole damages awarded, is unconstitutional, against common right, and null and void.

2nd. That the judgment of the said Land Commissioner against the relator and his property, and the execution by him thereupon issued, are without authority of law, and null and void.

State, ex rel. etc. v. The City of St. Louis, et al.

3rd. Because the jury impaneled in said proceedings, were not selected and impaneled by said Land Commissioner according to law, but by the Mayor of said City of St. Louis, in pursuance of said Ordinance No. 7047, and that said ordinance is null and void.

4th. Because the benefits assessed by the jury in said proceedings against the relator and others, were assessed in pursuance of the erroneous and unlawful instructions of the said Land Commissioner to the jury to the effect that the balance over and above what they might assess against the city, they should assess against the owners of the property benefited including the property of the relator, whether they might be benefited to the extent of said balance or not. And that in no event could they find more than ten per cent. of the damages against the City of St. Louis."

As to the first objection, that the law was unconstitutional, because it provided that not more than ten per cent. of the benefits should be assessed against the city, it is only necessary to remark, that that question was directly presented to this court in the case of *Uhrig vs. The City of St. Louis*, (44 Mo., 458,) and the law was sustained, and held to be entirely valid.

The second point raised is vague and general in its nature, and makes no specific objections, and it is not perceived that it was intended to include anything more than was comprehended in the first.

The third objection relates to the mode of impaneling the jury. The charter provides in reference to opening streets, that where it "becomes necessary for that purpose to take private property, just compensation shall be paid therefor to the owners of such property, which the Land Commissioner shall cause to be ascertained by a jury of six disinterested freeholders of the city, by proceedings prescribed by ordinance." (Sess. Acts 1870, p. 478, § 1.)

The city passed an ordinance to the effect, that whenever the City Council shall authorize and instruct the Land Commissioner to open any street it shall be the duty of the Mayor

to furnish to the City Marshal summoning the jury for such proceedings, the names of good and respectable freeholders, as required by the City Charter.

It must be observed that the law does not point out who shall summon the jury, or make the selection. But it leaves the whole matter, as to regulating the proceeding, to be prescribed by ordinance.

We may think that it was unwise, but we cannot therefore say that it was illegal.

When the jury was impaneled by the Land Commissioner, it was his duty to see that they were good and unexceptionable men, and if the first list furnished was objectionable, then others could have been obtained.

The ordinance only required the Mayor to select and furnish the names, but it imposed no duty on the Land Commissioner to receive them, unless they were men entirely competent and qualified. The selection might with more propriety have been committed to the Land Commissioner himself, and so the Legislature seems to have thought, for by a subsequent act they altered the law, taking the selection of the jury out of the hands of the Mayor, and giving it to the Land Commissioner.

At best the law as it stood when these proceedings were had, was perhaps unwise and inexpedient, but that would not authorize us in saying that it was wholly void.

The only answer that it is necessary to give to the fourth objection is, that it does not appear from the record that the Land Commissioner gave to the jury any instructions at all.

An examination of every point raised by this record, satisfies us that there is no error.

Judgment affirmed. The other Judges concur.

STATE OF MISSOURI, *ex rel.*, T. Z. BLAKEMAN, Relator *vs.* SAMUEL HAYS, State Auditor, Respondent.

1. *Statute, construction of—When retrospective.*—Statutes are not to be construed as having a retrospective effect, unless the intention is clearly expressed that they shall so operate, and unless the language employed admits of no other construction.
2. *Agents—Public or private—Unauthorized acts—Ratification.*—An agent, whether public or private, cannot ratify his own unauthorized act.
3. *Agents, public—Authority of.—Knowledge of.*—Individuals, as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity.

Mandamus.—On motion for a re-hearing.

T. Z. Blakeman, with Krum & Patrick, for Relator.

I. A re-hearing is prayed.—Because the court overlooked the fact that the warrant was drawn and delivered after the passage of the act creating the "Military Fund."

II. Because the decision of the court is in conflict with the cases of Fremont *vs.* The United States, 2 Ct. of Cl. R. 461, and Theodore Adams *vs.* The United States, 2 Ct. of Cl. R., 70.

A. J. Baker, Attorney General, for Respondent.

Filed no brief on this motion, but submitted the case on his former argument and brief.

EWING, Judge, delivered the opinion of the court.

At the October term, 1872, of this court, respondent filed a motion for judgment on the replication of the relator, on the following grounds substantially, namely: That it is alleged in respondent's return, and admitted by the relator in his reply, that the warrant was issued in payment of powder, and that said powder, if purchased at all, was so purchased on the 26th day of April, 1861, and prior to the act May 11, 1861, whereby the military fund upon which said warrant was drawn was created; that it is alleged by respondent that the Legislature of the State never ratified the supposed purchase, nor authorized its payment; and respondent asks judgment, if the act of May 11, 1861, was a ratification thereof, as plead-

ed by relator in his reply. This motion for judgment was sustained, and judgment entered accordingly at the last term.

The motion for a re-hearing presents these grounds: First—The court overlooked the fact that the warrant was drawn and delivered after the passage of the act creating the military fund. Second—The act of May, 1861, was a virtual ratification of the act of the Governor in the purchase of the powder. To this motion is annexed an affidavit of James Harding, the then (1861) Quartermaster General of the State, to the effect that in the months of April and May, 1861, he was such Quartermaster General, and as such, acting under the advice and direction of the Governor of the State, he purchased, for the use of the State of Missouri, a large quantity of gunpowder from Thomas H. Larkin in St. Louis; that as such officer he gave receipts for said powder to Thos. H. Larkin, and had the said powder, together with other powder purchased in St. Louis, transported to Jefferson City, and there stored; that soon after said purchase the Legislature was called together in extra session; that on or about the 8th of May, 1861, at the request of said Legislature, he made a report to the said Legislature in regard to his actions in purchasing said powder, wherein he showed when and where he made said purchase, where it was stored, and that the same had not been paid for.

The act referred to, which it is claimed was a ratification of the act of the Governor, or at least a legislative recognition of the obligation of the State to pay for purchases previously made by him, says, the Governor is hereby authorized and required to purchase such arms, munitions of war, and books of instruction, as he may deem best suited to accomplish the object designed by this act; and it shall be the duty of the auditor of public accounts, upon the order of the Governor, to draw his warrant upon the treasurer for the whole or any part of the military fund. (Acts 1861, section 5.)

It is conceded by the relator, that when the purchase was made, in April, 1861, it was done without authority. But it is maintained, "that the Governor affirmed his own act;"

that although the purchase was without authority, it was ratified by him in May, 1861, by ordering the delivery of a warrant of the auditor to Larkin, the agent.

The rule is well settled, that statutes are not to be construed as having a retrospective effect, unless the intention of the Legislature is clearly expressed that they shall so operate, and unless the language employed admits of no other construction.

There is obviously nothing to be found anywhere in the act in question, that either expressly or by implication warrants such a construction of it. It is wholly silent as to any previous action of the Governor, or as to any past transactions respecting the matter in controversy.

The position that the Governor ratified his own act is also untenable. The purchase having been made by him without authority, he could not ratify it directly or by any act signifying assent or acquiescence. The Governor himself was but an agent, and as he had no power to make the contract, he was therefore incapable of confirming or ratifying it. The sovereign power alone was competent to ratify it. (See *Delafield vs. State of Ill.*, 26 Wend., 192-228; *People vs. Phoenix Bank*, 24 Wend., 431; the *State vs. Bank Mo.*, 45 Mo., 528.) Public agents derive their authority from the law which authorizes their appointment. No person may profess ignorance of the extent of the power of a public agent, and individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity. (See *Commonwealth vs. Fenbe*, 10 Mass., 30; 1 Met., 165.)

It is further urged, that the warrant being drawn and delivered *after* the passage of the act creating the military fund, it is a fact worthy of consideration. The answer to this is, that the law creating this fund was not enacted until after the purchase in question, and did not, as we have seen, apply to previous transactions of this character. The delivery of a warrant drawn upon this fund, therefore, could have no efficacy.

Motion for a re-hearing overruled. The other Judges concur.

WILLIAM A. SMITH, Appellant, *vs.* ELLEN RICORDS, Administratrix of JAMES B. RICORDS, Respondent.

1. *Limitations, statute of—Trusts, express—Denial of trust.*—In express technical trusts, the statute of limitations does not begin to run, until the trust is denied by some open act of the trustee.
2. *Limitations, statute of—Trusts, implied—Right of action.*—In implied trusts, the statute of limitations begins to run as soon as the party has a right to commence a suit to declare and enforce the trust.

Appeal from St. Louis Circuit Court.

C. C. Whittelsey, for Appellant.

The statute of limitations does not run in favor of a trustee, until denial of trust or something done in breach thereof.

If an attorney procure a judgment in his own name and collect the money, there is a cause of action, and he may avail himself of the protection of the statute. (Johnson vs. Smith, 27 Mo., 591.) But until he collects the money there is no cause of action to be barred. If the attorney collect the money ten years after obtaining judgment, the action for account, or money had and received, then first accrues, and the statute then only commences running. (Rabsuhl vs. Lack, 35 Mo., 316; State vs. St. Gemme, 31 Mo., 230.)

Cline, Jamison & Day, for Respondent.

This is not a continuing trust, and is barred by the statute of limitations. (Gen. Stat., 1865, Chap. 191 §§ 9, 10; Stafford vs. Richardson, 15 Wend., 302; Williams vs. Carpenter, 42 Mo., 327, and brief of Glover & Shepley therein. Campbell's Adm. vs. Boggs, 48 Penn. St., 524.)

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in equity, to declare and enforce a trust in a judgment obtained by the defendant against one Francis Watkins, on the ground that the judgment obtained by the administratrix, was based upon a judgment obtained by the intestate, and that judgment was founded upon a note indorsed or assigned to the intestate for collection merely, and not for any consideration whatever. The note re-

ferred to was executed 7th August, 1854, and due from date for one thousand dollars. In 1855 the plaintiff removed to California, and before removing indorsed and delivered the note to the intestate for collection.

The indorsement on its face appeared to be for value received. The intestate brought suit in his own name on this note so indorsed to him, and recovered a judgment thereon January 6, 1857, for \$1,145, and costs. The intestate died in 1863, and defendant became his administratrix, and, according to the statute, gave due notice of her letters of administration.

The judgment so recovered by the intestate was not inventoried by the administratrix. But in 1869, she as administratrix instituted suit on that judgment against Watkins, in the St. Louis Circuit Court, and on March 20, 1871, recovered a judgment thereon against Watkins for \$2,131.11, and costs.

The plaintiff after his removal to California remained absent from the State from 1855, to March 1871. The defendant set up the statute of limitations of ten years, five years, and the limitation law of three years under the administration law of 1855.

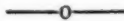
Judgment at Special Term was rendered in favor of the defendant, which on appeal to General Term was affirmed, and the plaintiff has appealed to this Court. It is evident from this record, that the main point is, whether the plaintiff was barred by the statute of limitations. It may be conceded, that the facts of the case constituted the intestate a trustee of the original judgment recovered against Watkins. But this sort of trust is not an express or direct continuing trust, which exists as long as it is not denied, between trustee and *cestui que trust*. In an express technical trust the statute of limitations does not commence to run, till the trust is denied by some open act of the trustee. But in implied trusts, which grow out of the facts and circumstances of each case, the statute commences to run as soon as the party has a right to commence a suit to declare and enforce the trust. (See *Keeton's heirs vs. Keeton's admr.*, 20 Mo., 530.) The case under review

State Savings Association of St. Louis, v. Kellogg, et al.

is one of this character. It is an implied trust, which the plaintiff had the right to call on a Court of equity to declare and enforce as soon as the first judgment was rendered in 1857. The fact of his absence in California did not stop the running of the statute of limitations. As it has been more than ten years since this cause of action accrued, it is unnecessary to decide, whether five or ten years is the proper bar under the General Statute. Under the administration law of 1855, all demands against an estate are required to be exhibited within three years after the grant of letters of administration and after due notice given of such letters, saving to infants, persons of unsound mind or imprisoned, and married women, three years after the removal of their disabilities. (See 1 Revised Laws 1855, p. 152, § 2.)

This administration was taken out, and the letters published, more than three years before this suit was instituted; and therefore this demand was not only barred by the General statute, but by the administration law.

Let the Judgment be affirmed. Judge Wagner absent. The other Judges concur.



STATE SAVINGS ASSOCIATION OF ST. LOUIS, Plaintiff in Error,
vs. SANFORD B. KELLOGG, *et al.*, Defendants in Error.

1. *Corporations—Dissolution—Insolvency—Stockholders, liability of.*—A corporation which is insolvent, and has been adjudicated a bankrupt under the United States Bankrupt Act, is dissolved, and a dissolution so brought about, is sufficient to authorize creditors to bring suits against its stockholders under the statute (W. S., 293, § 22,) without joining the company in the suit.
2. *Corporations—Insolvency—Suits against shareholders—Suit against corporation, not necessary, when.*—The statute which provides that stockholders shall not be personally liable for any debt contracted by the corporation unless suit shall be brought against the corporation within one year after the debt becomes due, (W. S., 336 § 13) does not apply when the corporation, has been dissolved by bankruptcy. Such suit against the corporation would be a useless form, and the law will not enforce an act which would be frivolous.

Error to St. Louis Circuit Court.

T. T. Gantt, for Plaintiff in Error.

I. The Southwestern Freight and Cotton Press Company was "*dissolved*" in June, 1869. It is admitted by the pleadings, that it was in that month decreed a bankrupt. It is further admitted by the pleadings, that it was then wholly without funds or means.

When it is provided in the act creating a corporation "that the individuals composing it shall be liable at the time of the dissolution of the company for the debts then due, any inability of the company by reason of a total want of funds to exercise its corporate powers, will be deemed a dissolution." (Ang. & Ames on Corp., § 613, (9th edition.) Penniman vs. Briggs, Hopk. Ch., 300; S. C., 8 Cow., 387; Bank of Poughkeepsie vs. Ibbotson, 24 Wend., 473.)

In the case of Slee vs. Bloom, 19 Johns., 456, the High Court of Errors reversed the decision of Kent, Chancellor. That eminent jurist had decreed that the corporation was not dissolved by insolvency. But Ch. Just. Spencer, delivering the opinion of the Court of Errors, held "that the corporation is dissolved when it has done, or suffered to be done, acts equivalent to a direct surrender." (p. 473.)

Pursuing the inquiry as to when the dissolution occurred, he remarked (p. 477) "we may safely say it happened on this February, 1818, when all the property of the company was sold."

The case of the Southwestern Freight and Cotton Press Company is stronger than this, for in June, 1869, it was adjudicated a bankrupt, on its own petition, and had no assets at all.

II. The conditions then obtained on which it is provided in § 20, Ch. 62, that "suits may be brought against any person or persons who were stockholders at the time of such dissolution," without suing the company itself.

If this be the only provision of the statutes which we need consult, it is difficult to see how the liability of the defendants can be denied. And even if § 13 of Ch. 69 must also be satisfied the same conclusion is, it is submitted, inevitable. But

the General Assembly had no right to impose the conditions which it prescribes. The pointed and emphatic mandate of the Constitution, (Cons. of Mo. Art., 9 Subd., 6,) is that "in all cases each stockholder shall be individually liable, over and above the stock by him or her owned, and any amount unpaid thereon, in a further sum at least equal in amount to such stock."

Looking to the provision of § 13 of Ch. 69, we see that it declares, substantially, that stockholders shall not be liable in all cases for the debts of corporations, but that in respect of debts of a certain character they shall not be liable at all.

Here is the legislative imposition of conditions, the legislative annexing of qualifications, of a very important nature, to the constitutional mandate. The conditions are arbitrary and onerous, and may be entirely impracticable. In the case at bar, the specific performance of the second of the conditions is, and was in 1869, impracticable. Its performance, *cypres*, would have been vain and futile.

III. But (supposing us bound by this provision, for the sake of the argument,) we are not barred by having omitted to sue the company within a year after the debt matured. Before the debt was sixty days old, the company was decreed a bankrupt. Not only was this the case, but it was then totally, absolutely, without any assets. Of course our statute, speaking as of the 1st August, 1866, at latest (p. 882, Rev. St., 65,) had reference to no provisions of the act of 2d March, 1867, which being passed by the Congress of the United States, in direct and express pursuance of the authority of the Federal Constitution, is "the supreme law of the land." Equally, of course, our Legislature in 1866, by the language employed, intended ordinary actions at law. It could not have intended to require a creditor to be guilty of a contempt of court, by suing in a State Court a decreed bankrupt.

The plaintiff was not bound to prove up its demand against the assets of the bankrupt corporation in the hands of the assignee. There were no assets at all. "*Lex neminem cogit ad vana, seu impossibilia.*" But if "the law compels no

man to do an idle, or an impossible thing," it surely cannot be argued either that it required the plaintiff to prove up his demand against an estate confessedly not able to pay costs, or to incur the penalties of a contempt by suing a decreed bankrupt in the courts of Missouri.

If indeed, there had been any assets in the hands of the assignee of the corporation, it was our duty to have exhausted them. But there being none, it will be strange doctrine if we were nevertheless obliged to go through the idle form of asking for a share of it. Surely this would be compelling a man to do a vain thing, contrary to the maxim "*lex neminem cogit ad vana seu inutilia*" (Broom's legal maxims, 248; Trustees of Huntington vs. Nicoll, 3 Johns., 566, 598.)

Glover & Shepley, for Defendants in Error.

I. The decisions have been uniform that insolvency within the meaning of the bankrupt law is only the present inability to pay the debts of the corporation or individual, as they mature.

II. The right given by the statute of this State against the individual stockholders, is only after all the means have been exhausted, as against the corporation, and all its assets applied so far as they will go.

Section 11 of the act (Genl. Stat. 1865 p. 328,) provides that only after a judgment has been obtained against the corporation and execution issued thereon, and no property was found sufficient to satisfy the execution, can the stockholder be called upon to respond. It proceeds upon the theory, that the assets must be exhausted before the individual liability commences.

III. The dissolution of the corporation spoken of in Section 20, which gives the right to sue the stockholder upon the "dissolution" of the corporation, is an absolute dissolution—a *ceasing to exist where there are neither officers to be served with process, nor assets to respond*, and therefore, judgment cannot be had against the corporation, because there is no one to respond.

That this is the meaning of that section, is obvious from

the preceding section, the 19th, which treats about the "dissolution" of the corporation. It provides that when a corporation dissolves—has ceased to exist—certain officers shall be trustees for the purpose of distributing its assets among its creditors, and may sue and be sued as such trustees. This can only be the case when the corporation has expired by limitation, or when it has surrendered its franchise. The "dissolution" spoken of in the 20th Section, is the "dissolution" spoken of in the 19th section, and so long as it can be sued as a corporation, and does not act by its former officers as its trustees, there has been no dissolution within the meaning of the act.

The 37th section of the bankrupt law provides that corporations shall not be discharged from their debts, but they exist as before.

Suppose the assignee pays 95 per cent. of the debts, what is to prevent the corporation from continuing till the term limited in its charter expires, by an issue of new stock or a voluntary assessment subscribed by its stockholders.

The present bankrupt law was mainly fashioned from the insolvent law of Massachusetts, and that law contained a similar provision in relation to discharge of a corporation. The same question now arising was presented in the case of *Coburn vs. Boston Papier Mache Company*, 10 Gray, 243; and Chief Justice Shaw, then decides that under such a provision the law does not operate as a dissolution.

The provision in the bankrupt law that there can be no discharge, admits the right to sue, however fruitless it might be.

IV. As this is a manufacturing Co., organized under G. S. Ch. 69; W. S. Ch., 37, Art, VII. there can be no recovery under the provisions of the 13th section against individual stockholders, unless suit had been commenced against the Company within one year after the debt became due, and neither was any suit commenced within one year, nor is it averred or proved that this debt was proved up in bankruptcy within one year, or at all.

WAGNER, Judge, delivered the opinion of the court.

This was an action against the defendants, as stockholders

of the Southwestern Freight & Cotton Press Co. The petition alleges the organization of the company as a corporation under the laws of this State, its existence as such corporation in 1869, its becoming indebted to plaintiff in the same year, and its dissolution in June 1869. The averment is that in June 1869, the said corporation became wholly insolvent and bankrupt, and presented its petition to the United States District Court and was in that month declared a bankrupt, and was totally without funds or means, whereby it became dissolved being unable by reason of a total want of funds and means to exercise its corporate powers.

The answer of the defendants denies that they or either of them are in any manner liable to the plaintiffs, but there is no denial of the insolvency of the incorporation. At the trial plaintiff proved the indebtedness of the corporation as stated in the petition. The case was then submitted on the pleadings and proofs, and at the request of the defendants the court declared the law to be, that the plaintiffs could not recover. This action was brought under the statute (1 W. S., p. 293, § 22) which declares, if any company formed under this act dissolve leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the company in such suit.

The first question is, whether the insolvency of the company amounted to a dissolution so as to give the plaintiffs the right to pursue this remedy.

In the case of *Moore vs. Whitcomb*, (48 Mo., 543,) it was held that a corporation might be dissolved by a surrender of its franchises, and if it suffered acts to be done which had the effect of destroying the end or object for which it was created, it was equivalent to a surrender of its rights and in effect a dissolution.

In the above cited case we mainly followed the leading case of *Slee vs. Bloom*, (19 John. 456) where the question is most thoroughly examined in the Court of Errors, in the State of New York. In that case it appears that pursuant to a statute the defendants associated together for establishing a cotton

manufactory, and became a corporation according to the provisions of the statute. For the space of one month there was no meeting of the trustees, nor any business or act done by the corporation; then all the property of the corporation real and personal was sold by the sheriff under an execution. Shortly thereafter the plaintiff, a creditor of the corporation, filed his bill against the defendants to charge them under the provisions of the act, as individually responsible for the debts of the corporation to the extent of their respective shares of stock, alleging that the corporation was to be considered as dissolved after the selling of all its property by the sheriff.

The court held that the corporation within the meaning and intent of the act, as regarded creditors, was dissolved, after ceasing to act as a corporation for such a length of time, and after a sale of all its property, and that the defendants were individually responsible for the debts of the corporation according to the act.

In the course of his able opinion Chief Justice Spencer said, "In point of good sense, this corporation was dissolved within the meaning and intent of the act, as regards creditors when it ceased *to own* any property, real or personal, and when it ceased for such a space of time, from doing any one act manifesting an intention to resume their corporate functions. The end, being and design of the corporation were completely determined, and if even it had the capacity to re-organize and re-invigorate itself, the case has happened when, as relates to its creditors, it is dissolved." The learned judge continued that, with respect to the period of dissolution, it happened when all the property of the company, was sold and that after that time no corporate act was done. So in *Penniman vs. Briggs*, (Hok. Ch., 300; S. C., 8 Cow., 387) where a manufacturing corporation, established under the same general law as that just alluded to, for twenty years, became insolvent within the time, and incompetent to act by the loss of all its funds, and under the provisions that "for all debts which shall be due and owing by the company at the time of its dissolution, the persons then composing the company should be

individually responsible to the extent of their respective shares of stock in the company and no further," it was decided that the corporation was to be deemed dissolved for the purpose of the remedy by the creditors against the stockholders individually. It may be admitted that the old and well established principle of law remains good as a general rule, that a corporation is not to be deemed dissolved by reason of any mis-user or non-user of its franchises, until the default has been judicially ascertained and declared. But it must be observed, that the plaintiff has no control over the process or remedy to dissolve this corporation, either for non-user or for any other cause. It is necessary that the State through its law officer should institute such proceedings. Then if we are to consider this corporation in existence, the plaintiff as a creditor before it can have any remedy, must wait till the charter expires by limitation of time, or until the law officer of the State shall see fit to institute proceedings to vacate it; which may never happen. In the meantime the creditor is wholly remediless. A doctrine so unreasonable, ought not to find any sanction or support.

Now the averment in the petition was that when the company presented its petition to the United States District Court, it was dissolved, being wholly unable, by reason of a total want of funds and means, to exercise its corporate powers. The answer admitted the total want of funds and means, the absolute destitution of assets, but denied the legal inference that the corporation was thereby dissolved within the meaning or sense in which that word is used in the statute.

When the corporation was utterly penniless, for what end or object did it continue. What good did it do the creditor to be told that there was the naked shadow but that the substance was all gone. The corporation for all essential purposes was as effectually dissolved as if a solemn judgment of court had been pronounced to that effect. I have no hesitation in coming to the opinion that there was such a dissolution as would afford creditors a remedy against the individual shareholders.

But it is further contended that this action is not sustainable because no suit was first brought against the company. The statute (1 W. S., p. 336, § 13) provides, that "no stock holder shall be personally liable for the payment of any debt contracted by any company formed under this chapter which is not to be paid within one year from the time the debt is contracted, nor unless a suit for the collection of such debt shall be brought against such company within one year after the debt shall become due, &c."

The law does not require useless things, and what possible good could have been accomplished by bringing suit against the company. It would only have been accumulating costs for the plaintiff to pay in addition to its failure to obtain any satisfaction.

Before the debt was sixty days old, the company was decreed a bankrupt. It had no assets whatever, it would have been an idle ceremony—a useless form—to have proved up the claim in the Bankrupt Court, for the estate was totally without funds or means of any kind. The Statute plainly refers to ordinary actions where there is a subsisting corporation. But here, before the limitation had expired the corporation was dissolved. The mere bringing of a suit under such a state of facts, would have been idle, vain and fruitless. Says Kent, Ch. J., in *Trustees of Huntington, vs. Nicoll*, (3 Johns., 566-598.) "It is one of the maxims of the common law, and which is a dictate of common sense, that the law will not attempt to do an act which would be vain, or to enforce an act which would be frivolous."

The acts in this case surely take it out of the dry letter of the law, and furnish a remedy within its spirit and meaning. A literal compliance would have been wholly futile, and the reason for not proceeding I think is good, legal and sufficient.

I am of the opinion that the judgment should be reversed, and the cause remanded.

The other judges concur, except Judge Sherwood, who is absent.

How v. Taylor.

JAMES F. HOW, Respondent, vs. PHILIP C. TAYLOR, Appellant.

1. *Fraudulent conveyances—Personal property—Change of possession—Bailees, notification to.*—A sale of personal property then in the hands of a bailee, followed by a notification to the bailee of such sale, is a sufficient change of possession as against the creditors of the vendor.

Appeal from St. Louis Circuit Court.

Bakewell & Farish, for Appellant.

There must have been "*actual*" (that is not merely virtual or constructive,) and continued change of possession. (W. S., 281, § 10.)

The California statute is ours precisely, as now amended. (Compiled Laws of California, 201, § 15; Bacon vs. Scannell, 9 Cal., 271; Stevens vs. Irwin, 15 Cal., 503; Engle vs. Marshall, 19 Cal., 320; Woods vs. Bugby, 29 Cal., 479; Claflin vs. Rosenberg, 42 Mo., 447.)

Moss & Sherzer, for Respondent.

There having been a *bona fide* sale by the owner, who was in a distant State, to plaintiff, of the paintings in dispute, then in the hands of a naked bailee, and the bailee having been informed of such sale, there having been no subsequent exercise of ownership over said property by said vendor, is sufficient to constitute such change of possession as contemplated in Sec. 10 of Statute on Fraudulent Conveyances. (Linton vs. Butz, 7 Barr., 89; Pierce vs. Chipman, 8 Vt., 334; Butt vs. Caldwell, 4 Bibb., 458; Harmon, *et al.* vs. Anderson, *et al.*, 2 Camp., 243; Sto. on Bail, § 282; Claflin vs. Rosenberg, 42 Mo., 450.)

VORIES, Judge, delivered the opinion of the court.

The defendant, as Sheriff of St. Louis County, levied on and seized, by virtue of an attachment in his hands against the property of John How, four pictures or paintings estimated to be of the value of one thousand dollars. The plaintiff claimed to be the owner of the paintings, and brought this suit in the nature of a replevin suit to recover the same.

The defendant in his answer denied plaintiff's right or title to the paintings, and charged that the paintings belonged to and were the property of John How, (plaintiff's father) and justified under the attachment against his property.

The suit was brought in October, 1871. The case was tried by a jury. The evidence offered by the plaintiff, was to the effect that John How, the plaintiff's father, in August, 1869, was the owner of the paintings in controversy, at which time he left Missouri, and went to Montana Territory, where he has ever since remained; that before he left he had the paintings put up in the Mercantile Library Hall, to be there kept by said Library Company for him; that they were hung up against the wall of said Hall, where they remained until in June, 1871, when for a valuable consideration they were sold to plaintiff; that a bill of sale was executed by said John How, by which the paintings were conveyed to plaintiff, at the bottom of which bill of sale was the following: "The Secretary of the Library Company will please deliver the above invoice of pictures to James F. How, of St. Louis. Virginia City, M. T., June 15th, 1871." That this order and bill of sale were shown to the actuary of said Library building and Company, who had charge of said Hall and pictures; that a written note was sent to the said actuary by plaintiff, informing him that the pictures belonged to plaintiff, and that he was not in a position to keep them, and inquiring if he could probably sell them to the Library Association; that he also saw the actuary in person, on the subject of selling the pictures to the Company, telling him that he had bought them, and would have a bill of sale of them, that it was on the way here; that the paintings were still left hanging on the wall of the Library building, until they were seized by the defendant on the 21st of Sept., 1871 when the actuary of the Library Company gave plaintiff notice of the fact; that John How when he left here was insolvent.

The evidence for the defendant in some matters contradicted the evidence of plaintiff. One Dyer, the actuary of the Company, testified, that plaintiff came to him in the spring of

1871, and asked him if the Library Association wished to buy pictures; that he told plaintiff that he would inquire of the Board, and that about August he notified the Board that plaintiff wanted to sell the pictures; that the Board said they would require a bill of sale of John How, and that witness required a bill of sale from plaintiff; that plaintiff said he had full power of attorney from his father to act for him to sell pictures. On cross-examination witness stated, that plaintiff notified him, that the pictures were transferred to him, that he did not say he had bought them, but that they had been transferred to him; he also stated, that plaintiff had written him a letter, in which he notified him of the transfer, and said that the "pictures now belong to me, and not being in a position to keep them, he wished to sell them." The witness stated further, that the pictures would have remained where they were, whether plaintiff had demanded them or not, that he had never recognized plaintiff as the owner of them. The papers in the attachment suit were offered in evidence, and the evidence closed. The above is substantially the evidence in the case.

The defendant then asked the court to instruct the jury as follows :

"If the jury believe from the evidence, that the Mercantile Library Association received from John How the pictures in question, to be safely kept for him, that afterwards being then insolvent and absent from the State, he drew upon his son, James F. How, the drafts mentioned in evidence, which said James F. How refused to accept, because he had no money to pay the same, and no property belonging to his father by which he could raise such money; that said James communicated said fact to his father, whereupon said John How executed and mailed to said James, who duly received the same, the bill of sale offered in evidence, that before he knew of the execution of said bill of sale, said James paid one of said drafts at maturity with money of a third person in his hands, and after receiving said bill of sale paid the remaining drafts at maturity, that the said bill of sale was never acknowledged

or recorded, and that the said Mercantile Library Association did not, up to the date of the levy herein, recognize said James F. How as the owner of said pictures, and agree to hold the same for him, the said James, as sole owner thereof, they will find for the defendant."

2nd. "Should the jury believe from the evidence, that the goods in question were actually sold by John How to his son, James F. How, yet unless they further believe from the evidence, that the sale was accompanied by a delivery in a reasonable time, regard being had to the situation of the property, and was also followed by an actual and continued change of possession of the goods sold, they will find for the defendants."

3rd. "If the jury believe from the evidence, that John How left the pictures in question with the Mercantile Library Association to hold and keep for him, and afterwards purported to sell the same to his son, James F. How, and that the pictures remained in the custody of said Mercantile Library Association up to the date of the levy of the Sheriff, they will find for the defendant; unless they further believe from the evidence, that the said Mercantile Library Association had before said levy, actual notice of said alleged change of ownership, and agreed to hold said goods for said alleged purchaser."

4th. "Should the jury believe from the evidence, that the alleged sale of the pictures in question from John How to James F. How, was made in good faith and for a valuable consideration, yet unless they further believe from the evidence, that James F. How took actual possession of the said pictures, that the change of possession was visible and continuous; and exclusive as against the seller, the said John How, and such as indicated to purchasers at large, that said John How no longer had possession or control of the said goods, they will find for defendant."

The court refused said instructions and gave three instructions on its own motion, and the defendant excepted. The instructions given were as follows: "If there was a *bona fide* sale of the pictures in dispute by John How to plaintiff, and

How v, Taylor.

if, prior to the levy on them by defendant, there was an actual, visible, continued, charge of the possession of the same, then the jury will find for the plaintiff. ”

“If the jury believe from the evidence, that the plaintiff did not in good faith purchase the said pictures, and that there was no actual, visible and continued change of possession of said pictures prior to the levy thereon by defendant, they will find for the defendant. ”

“If the jury believe from the evidence, that prior to the levy by defendant on the pictures, the plaintiff notified and informed Mr. Dyer, that he had bought said pictures, and that he was the owner thereof, then there was such change of the possession, as is contemplated by instructions one and two. ”

The jury found a verdict for the plaintiff.

The defendant filed a motion to set aside the verdict and grant a new trial, setting forth as ground thereof the opinions of the court excepted to.

The court overruled said motion, and rendered final judgment against defendant on the verdict. The defendant again excepted, and appealed to the General Term of the St. Louis Circuit Court, where said judgment was affirmed, and from this last judgment defendant has appealed to this court.

The proper construction of the 10th section of the statute concerning fraudulent conveyances is the only matter for the consideration of this court. (1 W. S., 281.) There is no question in this court as to the honesty or fraud of the plaintiff in the purchase of the property, that matter has been submitted to a jury and will not be examined here ; but the question presented is, was there such a delivery and change of possession of the pictures sold to plaintiff, as to make the sale effectual to pass the property in the pictures to him as against the creditors of his vendor, or is there such a want of a change in the possession as to make the sale void as to said creditors ? The statute provides, that “Every sale made by a vendor of goods and chattels in his possession or under his control, unless the same be accompanied by delivery in a reasonable time (regard being had to the situation of the property,) and be followed by

an actual and continued change of the possession of the things sold, shall be held fraudulent and void as against the creditors of the vendor or subsequent purchasers in good faith." Under this statute, where chattels are in the actual and visible possession or control of the vendor, and are capable of being delivered to the purchaser, in order to the validity of the purchase as to the creditors an actual and visible change of the possession must take place and continue in the vendee. The statute in such case can admit of but one construction. Of this character was the case of *Clafin vs. Rosenberg*, (42 Mo., 439.) In that case the evidence showed, that Strauss was a milliner doing business in St. Louis, that he was a brother-in-law to the defendant, that he had loaned him considerable amounts, and paid out money on his account. That in consideration of these debts defendant gave him a bill of sale of the goods in his store, and turned the same over to the interpleader in the cause, who on the same evening made an arrangement with the defendant, by which he employed him as a clerk for wages. The defendant continued to take charge and control of the store, as he did before the sale, and to the outside world appeared as before the sale to be the owner of the goods, selling them just as he did before the sale. It was properly held in that case, that no such change of the possession of the goods had taken place as was contemplated by the section of the statute above set forth, and that the sale was void as to creditors. In that case the vendor was in the actual, *visible* possession of the goods, the goods were capable of being delivered to the vendee at once, and in order to the validity of the sale as against creditors, the *actual, visible* possession must have been changed, and the change continued. This would be required in all cases where the property is capable of such delivery, and where the vendor is in the actual, *visible* possession and control of the property, and has the ability to make an actual delivery and thereby create an actual and visible change of the possession. In such case for the vendor to remain in the apparent possession of the property as before the sale would be calculated to give him a fictitious credit, and thereby enable him to deceive

and defraud creditors. It is this evil, that the statute is intended to remedy. Numerous cases might be cited in addition to the case of Claflin above referred to, which uphold the principle of that case. But the case now under consideration is not of that character of cases. The vendor in this case resided, and had resided for years, in the Territory of Montana, at least a thousand miles from St. Louis. The plaintiff and the property sold were in St. Louis, and the property was in the possession of a bailee. The vendor did not have the possession of the property, nor had he, so far as the public was concerned, any visible control of the same. The only way that he could control the property was to order his bailee to deliver it to a purchaser, if he could sell it, or otherwise dispose of it. This he did when he sold the property to plaintiff. He gave the plaintiff an order for the property, the plaintiff notified the bailee that the pictures had been transferred to and belonged to him, and offered to sell the pictures to the Library Association, and the vendor never pretended to exercise any acts of ownership or control over the property after the sale. The question is, will these facts constitute such a change of the possession, as is contemplated by the statute. It is contended by the defendant that to change the possession in such cases, it is at least necessary that the bailee should consent to the change of possession, and agree to become the bailee of the purchaser; whilst on the other hand it is insisted, that it is only necessary to notify the bailee of the transfer of the property, and he at once becomes the bailee of the purchaser. In the case of Harman vs. Anderson, 2 Camp., 243, it was held, that "Where the purchaser of goods has lodged an order to deliver with the wharfinger in whose warehouse they lie, * * * the wharfinger is bound to hold the goods as the agent of the purchaser, and this is so without any transfer in his books." Lord Ellenborough says, that "after the note was delivered to the wharfingers, they were bound to hold the goods on account of the purchaser."

The statute of Pennsylvania in reference to fraudulent conveyances is almost exactly similar to ours. In that State the

Supreme Court, in the case of Linton vs. Butz, 7 Barr., 89, in construing their statute, uses the following language: "And where the possession does not follow as well as accompany a transfer, it is a fraud in law without regard to the intent of the parties. It is not sufficient, that the assignor give to the assignee a delivery which may be symbolical, a constructive or a temporary delivery, and then take the articles back into his own possession and keep and use them as before. The learned Judge continues: "The case in hand differs in two particulars from the case cited. Here at the sale the article sold was not in the possession of the vendor, but in the hands of another as bailee, and the vendor did not take it again into his own possession. Hence the property being in the hands of the bailee, the only possession was given of which it was susceptible. *This is all that is required.*"

And in the case of Tierce vs. Chipman, 8 Ver. 334, it is held, that where property at the time of sale was in the hands of a bailee, who was informed by the vendor and vendee of the property being sold, this is a sufficient change of possession to protect it from the creditors of the vendor. These cases seem to be exactly in their facts like the case now under consideration, and it seems from these cases, that it is not required that the bailee should consent or agree to be the bailee of the purchaser, but that all that is necessary is, that he should be notified of the transfer of the goods, and that he at once becomes the bailee of the purchaser, and, if the vendor uses no further acts of ownership over the goods, the possession is changed so as to protect the property from the creditors of a purchaser of the vendor. The case of Butts vs. Caldwell, 4 Bibb., 458 is to the same effect as the cases before cited. I think that the doctrine contained in these cases is sustained by both authority and reason, and that the object of the statute is fully carried out by the construction therein given. It is however suggested, that as the bailee in this case never recognized the plaintiff as the owner of the pictures, and would not have delivered them to him if they had been demanded, that therefore no change of possession was made or effected. If

How v. Taylor.

this be so, then it would appear that all the possession, that could under the circumstances be given, was given; the mere fact that the bailee refused to deliver the property to a purchaser, or to acknowledge his right to the same, could not affect the rights of the purchaser, or prevent him from being his bailee.

By the first and third instruction asked for by the defendant it was required of the jury, that they should not only find, that the plaintiff had purchased the goods in good faith, but that the bailee had recognized plaintiff as the owner, *and agreed to hold the pictures* as his bailee. These instructions were properly refused. Instructions two and four asked by the defendant may be good law, abstractly speaking, but they were not adapted to the facts of this case, and the whole ground intended to be covered by them was fully covered by the instructions given by the court. The three instructions given by the court, when all taken together, fully and fairly presented the law of the case to the jury; they at least presented it to the jury in its most favorable light for the defendant, and I think in the light of the law as contained in the cases above referred to. Wherefore there was no error committed by the court in overruling defendants other instructions.

Judge Sherwood not sitting. The other Judges concurring, the judgment of the St. Louis Circuit Court is affirmed.

State to use etc. v. Dailey et al.

STATE OF MISSOURI to the use of JOHN MCFALL, Respondent,
vs. PETER P. DAILEY, *et al.*, Appellants.

1. *Bonds, official—Suits—Evidence—Account—Public and private transactions.*
—A., the Marshal of St. Louis County, sued B., the Clerk of St. Louis Criminal Court, and his sureties, on his official bond for fees collected by B. as such clerk, belonging to A. A. offered in evidence, a written statement of their accounts, official and private, given to him by B. *Held*, that this statement was admissible in evidence, if the official and individual items could be separated therein, and that the court should instruct the jury to disregard the individual items.

Appeal from St. Louis Circuit Court.

Krum & Patrick, for Appellants.

Exhibit X was inadmissible in evidence, because the account consisted of private and official items without distinguishing which.

Thos. C. Fletcher, for Respondent.

Exhibit "X" was a statement of the accounts between the parties, made by defendant's clerk by his directions, and from his books; and with that statement both parties were satisfied, and fully acquiesced in it. It was admissible in evidence, though the jury should have been instructed, if it contained items of a private nature, to exclude them.

WAGNER, Judge, delivered the opinion of the court.

This was an action against the defendant and his sureties on his official bond, as Clerk of the St. Louis Criminal Court. The plaintiff was the County Marshal, and claimed, that the defendant as clerk, had collected fees belonging to him, and failed to pay them over. There was conflicting evidence in relation to the true state of the accounts, and there was some evidence tending to show that the parties had private dealings, and that the private and official matters were intermingled together.

E. J. Drewyer was a witness for the plaintiff, and he testified, that he was a clerk for the defendant, and at defendant's request he examined the books and made a statement of the accounts between plaintiff and defendant, and showed it to

the defendant. This statement was marked exhibit X, and showed a balance at the time it was made in favor of the plaintiff. The exhibit included both private and official accounts, and was introduced in evidence by the plaintiff, and formed a very material link in the chain of his testimony. In reference to this testimony the court instructed the jury, that if the account marked exhibit X contained items of a private, as well as of an official nature, then it could not be used in evidence in the case.

The judgment was for the defendant at Special Term, but that judgment was reversed at General Term, and the cause remanded for a new trial. The action of the court in giving the above instruction constitutes the principal ground of alleged error in the case, and is the only question that calls for any attention. Nothing can be plainer, than that, in an action of this character, no items of private indebtedness between the parties would be admissible in evidence. No judgment could be given against the sureties, founded upon an individual obligation. Their undertaking was to be responsible for official, not private acts. But it does not thence follow, that the exhibit was to be totally disregarded. If it contained items, which related to official and individual liabilities, and they were capable of separation, those which pertained to the official acts should have been considered. The exhibit was in evidence, and the court should not have told the jury that it could not be used as evidence in the case, but should have instructed them that if it contained items of a private nature, such items should be excluded.

I think the judgment at General Term was right and should be affirmed. The other Judges concur.

INDEX.

ACCORD AND SATISFACTION.

1. *Payments—Satisfaction—Part for all—Receipt.*—Payment of part of a debt or liquidated damages is not a payment of the whole debt, even when the creditor agrees to receive a part for the whole and executes a receipt for the whole, except in fair and well-understood compromises carried faithfully into effect or, if the payment is in any way more beneficial to the creditor than that prescribed in the contract.—*Riley v. Kershaw*, 224.
2. *Estoppel—Creditors—Partnership—Debt of one partner—Deeds of composition.*—A co-partnership conveyed all their assets to trustees for the benefit of their creditors, in pursuance of a resolution adopted at a meeting of the creditors. At that meeting a creditor of one of the partners was present, and by consent of all, his debt was admitted as a partnership debt. *Held*, that the creditors were afterwards estopped to deny that that debt was a partnership debt.—*Diemeyer v. Hackman*, 282.
3. *Deeds of composition—Releases—Validity—Creditors.*—Deeds of composition and releases, in the absence of fraud towards any creditors, are legitimate and should be upheld by the courts.—*Id.*

ADMINISTRATION.

1. *Administration—Probate Court, exclusive jurisdiction of—Circuit Court—Bill of Interpleader.*—The Probate Court has exclusive original jurisdiction in directing the appropriation of the proceeds of an estate by an administrator, and a bill of interpleader by an administrator in the Circuit Court to determine the claims of different parties on such funds cannot be sustained.—*Chandler, Admr. v. Dodson*, 128.
2. *Administration—Assets—Situs.*—In administration the real *situs* of the assets is, where the debtor resides and the assets are located.—*Partnership Estate of Henry Ames & Co.*, 290.
3. *Administrator—Authority of—Foreign State.*—The authority of an administrator does not extend beyond the limits of the Government granting the letters, unless the foreign law controlling the assets permits it.—*Id.*
4. *Administration—Executor de son tort—Contracts, enforcement of—Third parties.*—Third parties cannot call upon an administrator to carry out contracts, which they have made with an administrator *de son tort* of the same estate.—*Barr v. Cubbage*, 404.

See, Bills and Notes, 5, 7, 8.

ADVERTISEMENT ; See, Mortgages and Deeds of Trust, 2.

AGENCY.

1. *Agent—Notice to—Principal, when bound.*—Notice given to an agent while his agency exists, and referring to business coming within the scope of his

AGENCY Continued.

- authority, is notice to the principal.—*Hayward v. National Insurance Company of Hannibal*, 181.
2. *Agent—Statements, when made—Principal, liability of.*—Statements of agents do not bind their principals, unless made at the time of the transaction so as to form part of it.—*Golson v. Ebert*, 260.
 3. *Contracts—Interpretation of—Agents.*—A. professing to act for himself and for B. and C., makes a contract under seal with D. agreeing, that he will do certain work for D., for which D. agrees to pay him, and the contract concludes, that the undersigned bind themselves in the penal sum of one thousand dollars for its fulfillment. A. and D. alone sign the contract. Upon a suit for not doing the work, *held*, that A. alone was liable.—*Einstein v. Holt*, 340.
 4. *Agency—Authority, proof of—Written instruments—Habit and course of business.*—The authority of an agent is not necessarily to be proved by written instruments, but may be proved by the habit and course of business of the principal.—*Franklin v. The Globe Mutual Life Insurance Company*, 461.
 5. *Corporations—Officers—Acts of—Authority presumed.*—The authority of the chief officer of a corporation to perform certain official acts, may be proven by co-temporaneous or subsequent evidence of special authority.—*Washington Mutual Fire Insurance Company v. St. Mary's Seminary*, 480.
 6. *Agents—Public or private—Unauthorized acts—Ratification.*—An agent, whether public or private, cannot ratify his own authorized acts.—*State, ex rel. Blakeman v. Hays*, 578.
 7. *Agents, public—Authority of—Knowledge of.*—Individuals, as well as courts, must take notice of the extent of authority conferred by law upon a person acting in an official capacity.—*Id.*
See, Brokers; Conveyances, 1.

APPEARANCE; See, Practice civil, 1; Practice civil, Trials, 5.

ARBITRATION AND AWARD.

1. *Arbitration, statute concerning—Equitable defenses—Partiality of arbitration.*—Where A and B submitted their dispute to arbitration under the statute an award was made, but no attempt appears to have been made to procure a judgment on the award, and suit was brought upon the award within two months after it was made, and the defendant alleged in his answer the prejudice of one of the arbitrators, unknown to him at the time of the submission.—*Held*, that the allegation was a good equitable defense.—*Hieronimus v. Allison*, 102.
2. *Arbitrations—Partiality—Courts of equity.*—Courts of equity will relieve against the partiality or corruption of arbitrators, especially under the statute of this State.—*Id.*
3. *Arbitration—Statute, motions under—Loss of papers—Award, suit on.*—Where the papers containing the submission and award were destroyed and no opportunity apparently afforded defendant to move to vacate the award, *Held*, that the defendant's answer to a suit on the award, might well be treated, as in the nature of such motion, or as objections upon a motion to confirm.—*Id.*
4. *Deeds of composition—Releases—Validity—Creditors.*—Deeds of composition and releases, in the absence of fraud towards any creditors, are legitimate and should be upheld by the Courts.—*Diermeyer v. Hackman*, 282.

ASSAULT AND BATTERY; See Practice, Criminal, 14.

ATTACHMENT.

1. *Attachment—Garnishment—Non-resident defendant—Jurisdiction, etc.*—Delivery of a copy of the writ to a defendant residing in another state (W. S., 1009, § 181.) and garnishment of a judgment debtor of defendant upon an attachment issued against defendant, is sufficient to give the court trying the cause jurisdiction till the attachment proceedings are determined.—*Orear v. Clough*, 53.

See Garnishment.

ATTORNEY, CIRCUIT; See Circuit Attorney.

ATTORNEY GENERAL; See Officers, 1.

B.

BAILMENT; See Agency; Banks and Banking; Carriers; Fraudulent conveyances, 1.

BANKS AND BANKING.

1. *Alienation of property—By-law of bank prohibiting—Restraint of trade.*—The right of alienation is an incident of property, and a by-law of a bank prohibiting the alienation of stock therein, or putting restrictions thereon, is void, as being in restraint of trade.—*Moore v. The Bank of Commerce*, 377.

2. *Estoppel—Bank stock, loan on—Officer of bank, representations of.*—An officer of a bank informed a party applying to the bank, that he might safely loan money on a pledge of their stock to the owner of it, taking the stock as pledge: *Held*, that the bank was, after the loan was made, estopped to forfeit the stock for alleged dues.—*Id.*
See Trusts and Trustees, 1.

BILLS AND NOTES.

1. *Bills and notes—Assignment before maturity—Notice—Equitable defenses.*—In order to let in equitable defenses against a note assigned before maturity, express notice of the consideration, before the assignment was made, is not indispensable; but it will be sufficient if the circumstances are of such a strong and pointed character as necessarily to cast a shade upon the transaction and to put the holder on inquiry.—*Hamilton v. Marks*, 78.

2. *Limitations, statute of—Note—Partial Payment—Indorsement.*—An indorsement of partial payment, made on a note by the holder without the privity of the maker, is not of itself sufficient evidence of a payment to repel a defense created by the Statute of Limitations; but such indorsement made by the consent of the maker is sufficient.—*Phillips v. Mahan*, 197.

3. *Bills of Exchange and Promissory Notes—Protest—Indorsers—Due diligence—Questions of Law and of Fact.*—When the facts are agreed on, due diligence in making a demand of payment is a question of law; when the facts are not agreed on, it is a mixed question of law and fact.—*Fourth National Bank of St. Louis, v. Heuschen, et al.*, 207.

4. *Bills of Exchange and Promissory Notes—Protest—Partnership, dissolution of—Notice.*—A partnership, though dissolved, is still in existence so far as the question of demand and protest of their negotiable paper, and notice thereof is concerned; and a demand made on one of the partners, or made at a place which one of the partners said was their place of business, is good.—*Id.*

5. *Bills of exchange and promissory notes—Consideration—Appointment of an administrator—Public policy.*—A promissory note, whereof the consideration is an agreement to procure a responsible party and have him appointed administrator of an estate, is void as against public policy.—*Porter v. Jones*, 399.

6. *Bills and notes—Transfer before maturity—Consideration, when may be inquired into.*—An indorsee of negotiable paper before maturity is presumed to be the owner in good faith and for value, unless there are circumstances antecedent to, or attendant on, the act of transfer, amounting to either actual notice to the holder, of fraud, illegality or failure of consideration, or to such a combination of suspicious circumstances, as would in legal contemplation afford ground for the presumption that the purchaser of the paper was aware, at the time of its acquisition, of some equity between the original parties thereto, which should have prevented its purchase by him.—*Horton v. Bayne*, 531.

7. *Bills and Notes—Partnership—Death of partner—Renewals—Liability of estate of deceased.*—A. died, leaving the firm of which he was a member indebted to B. which debt was witnessed by notes. These notes were afterwards given up, and other notes in renewal thereof taken, but the creditor stipulated, that such

BILLS AND NOTES. Continued.

action should not discharge the estate of A. *Held*, that A.'s estate was still liable, either as on a balance of the original debt, or of the surrendered notes. —*Boatmens Savings Institution v. Mead*, Adm'r. 543.

8. *Bills and notes—Renewal by surviving partner—Protest.*—A, B. and C., while partners, indorsed certain promissory notes. A. died before the notes matured. At the maturity of the notes, part of the amount was paid by the maker, and renewal notes were given for the remainder, which were indorsed by B. and C. with the former firm name, and the original notes were surrendered up to the makers and destroyed. The original notes were not protested, nor were any steps taken to hold A.'s estate upon them. *Held*, that A.'s estate would not be held liable for the amount unpaid on the original notes, nor on the renewal notes; and it makes no difference, that the holder of the notes had an understanding with B. and C., that the renewal notes were not taken in satisfaction of the original debt. —*Central Savings Bank v. Mead*, Admr., 546.

See Carriers, 1; Limitations, 1; Partnership, 2; Practice, civil—Pleading, 1, 8, 9, 14.

BILLS OF LADING; See Carriers, 1.

BONDS.

1. *Bonds—Escrow—Execution of—Principal parties.*—Where A. procured the signature of B. as his surety on a bond, B. signing it on condition that C.'s signature should also be procured to it by A.; but C.'s signature was never procured, but his name was forged on the bond; in a suit by the obligee on the bond; *Held*, that there was no delivery by B., and the bond was void as to him. —*Linn County and The State v. Farris, et al.*, 75.

2. *Bonds—Creditors—Sureties—Fraud of principal in execution.*—When a principal procures the signatures of sureties to his bond by fraud, of which the creditor is ignorant, the remedy of the sureties is against the principal, and not against the creditor. *Id.*

See Bonds, appeal; Bonds, indemnity; Bonds, official; Justices' Courts, 1, 2.

BONDS, APPEAL; See Justices' Courts, 1, 2; Landlord and Tenant, 6.

BONDS, INDEMNITY; See Constable, 2, 3, 4.

BONDS, OFFICIAL.

1. *Bonds, official—Sureties, liability of—Implication.*—The engagement of a surety on an official bond is entered into with reference to the law which defines the duty of the officer, and cannot be extended by implication. —*City of St. Louis v. Sickles, Executrix*, 122.

2. *Bonds, official—Suits—Evidence—Account—Public and private transactions.*—A. the marshal of St. Louis County, sued B., the Clerk of St. Louis Criminal Court, and his sureties on his official bond, for fees collected by B. as such clerk, belonging to A. A. offered in evidence a written statement of their accounts, official and private, given to him by B. *Held*, that this statement was admissible in evidence, if the official and individual items could be separated therein, and that the court should instruct the jury to disregard the individual items. —*State v. Dailey, et al.*, 601.

BROKERS.

1. *Contracts—Commissions—Brokers.*—A. wishing to borrow money on some property, applied to B., who agreed to find a lender, and to have the title examined, and would charge \$200, which would include the expenses of examining the title and his commission; A. gave B. his title deeds at the time; a defect being found in the title, the lender refused to loan the money, and B. sued A. for the \$200. *Held*, that B. should have first examined the title before applying for a loan, and was A.'s agent for that purpose, as well as for procuring a loan, and was not entitled to his commissions. —*Budd et al. v. Zoller*, 238.
2. *Contracts—Commissions—Brokers.*—A broker employed to effect a loan, is entitled to his commission when he has found a lender, who has the money and who approves of the security, unless his rights are varied by special con-

BROKERS. Continued.

tract. There is always an implied condition that the borrower will show a good title. *Id.* PER EWING and WAGNER, Judges, dissenting.

3. *Contracts—Real estate agents—Commissions, when entitled to.*—If property is put into the hands of a real estate agent to sell, he is entitled to his commission, if the sale is brought about by his advertisements or exertions, or if he introduces the purchaser, or discloses his name to the seller, and through such introduction or disclosures the sale is effected, even though the sale may be made by the owner.—*Tyler v. Parr*, 249.

4. *Broker—Real estate—Commissions—Default of owner.*—A broker, who negotiates a sale of real estate, is entitled to his commissions, though, owing to the default of his employer, the sale is never effected.—*Carpenter v. Rynders*, 278.

See Revenue, 4.

BURDEN OF PROOF; See Practice, civil—Trials, 2, 3.

C.**CARRIERS.**

1. *Common Carriers—Liability—Bills of lading—Goods not received—Third parties.*—The owners of a boat are not rendered liable at the suit of a third party, in consequence of a bill of lading having been issued for goods as shipped on board that boat by one apparently having authority therefor, to the consignor named in said bill of lading, who negotiated a bill of exchange drawn on the consignee to such third party, who purchases and has indorsed to him for value, the bill of exchange, on the faith and on the security of the bill of lading which is also transferred to him, without any knowledge or notice of lack of authority on the part of him, who signed the bill of lading, or that the goods recited in the bill of lading were never shipped.—*Louisiana National Bank of New Orleans, vs. Laveille, et al.*, 380.

2. *Common carriers—Liability—Special contract—Negligence.*—A common carrier by a special contract can limit his common law liability, but cannot exempt himself from the consequences of his own negligence.—*Ketchum vs. The American Merchants Union Express Company*, 390.

3. *Common carriers—Breakage—Negligence—Prima facie case.*—Proof of breakage of goods in the hands of the common carrier makes a *prima facie* case of negligence against him, and the burden of proof is thrown on him to show due care and vigilance. *Id.*

4. *Common carrier—Action against, for goods lost—Value of goods—Evidence.*—In the trial of a suit against a carrier for the value of a chest and its contents, which were enumerated in the petition, a witness, after stating the value in detail of a number of articles, was asked if she knew the value of the chest and its contents, and answered that she did, and named the value at \$400.00. She also stated that besides the articles she had specifically mentioned, there were some others which she had not named. This statement was not made in answer to any question asked her, but in connection with her testimony relating to the contents of the chest. *Held*, that an objection to her testimony on the ground, that there was evidence tending to show that there were more goods in the chest than were sued for, was not well taken.—*Seyfarth, vs. St. Louis & Iron Mountain Railroad Company*, 449.

5. *Common carrier—Suit against, for goods lost—Evidence of value.*—In a suit against a common carrier for the value of household goods lost, it is competent for plaintiff to ask a witness as to value, whose opinion is based upon a knowledge of the articles lost and not on his skill as an expert, his opinion as to their value in bulk. The plaintiff is not obliged to restrict the examination to the value of each article, and in that way arrive at their total value; nor is it incumbent on him to show the process by which the conclusion of the witness is reached. *Id.*

CIRCUIT ATTORNEY, See Practice, Criminal, 1, 13.

CLERK, CIRCUIT.

1. *Circuit Clerks—Fees—Excess of, over salary—Must be paid into county treasury whenever collected.*—The fees collected by the clerk of a Circuit Court, which are in excess of the salary allowed by law, must be paid into the county treasury whether they are collected before or after his term of office expires.—*In re Lewis*, 550.

COLOR OF TITLE. See Land and Land titles, 3, 4, 5,

COMPOSITION. See Arbitration and Award, 4.

CONFLICT OF LAWS. See Administration, 3; Contracts, 4.

CONSIDERATION. See Bills and Notes; Contracts.

CONSTABLES.

1. *Constable—Deputy—Replevin—Judicial process.*—An action for the claim and delivery of personal property may be brought against the deputy constable, who has seized it by virtue of an execution in his hands against a third party.—*Criley v. Vasei*, 445.
2. *Constable—Indemnity bond—Claim and delivery of personal property.*—After an execution of an indemnity bond to a constable for property seized by him on execution, the claimant of the property has no remedy against the constable.—*State*, to the use of *Grassmuck, v. Platt, et al.*, 466.
3. *Practice, civil—Actions—Indemnity bond, suit on—Replevin against constable—Bar—Damages.*—A constable seized property by virtue of an execution in his possession, and took an indemnity bond. B., claiming this property, brought an action of replevin against the constable, wherein he was defeated. He afterwards sued on the indemnity bond. *Held*, that, inasmuch as the question of ownership was not involved in the replevin suit, that suit was no bar to the suit on the indemnity bond; and, inasmuch as the constable elected in the replevin suit to take the value of the property, that the plaintiff in the suit on the bond, was damaged at least to that amount. *Id.*
4. *Practice, civil—Replevin—Judgment—Constable—Proceeds.*—When a constable recovers judgment in a replevin suit brought against him for property seized by him on execution, and elects to take the value thereof, the value so obtained, takes the place of the property, and must be disposed of by him accordingly. He must pay off the original execution and costs, and hold the balance for the bondsmen against whom the judgment is rendered. *Id.*

CONSTITUTION OF MISSOURI.

1. *Statutes—Constitution—Public instruction—Sugar Tree Grove Academy, act of incorporation of—Repeal by implication.*—Sections 5 and 6 of the charter of the Sugar Tree Grove Academy, being inconsistent with the present constitution of the State and the acts passed pursuant thereto, are repealed by implication.—*Waller v. Everett* 57.
2. *Laws in restraint of traffic or alienation of property—Constitutionality—Police regulations.*—A law, which unnecessarily and oppressively restrains a citizen from engaging in any traffic, or disposing of his property, is void, even though passed under the specious pretext of a police regulation; but if it is passed in good faith, for the purpose of preserving the public health, and abating nuisances, and contains only the necessary limitations, it is valid. [*Sess. Acts 1872*, p. 265, and ordinance of City of St. Louis relating thereto, affirmed.—*State v. Fisher*, 174.

See Corporations, 2; St. Louis City of, 1, 2; Statute Constitution of, 1.

CONTRACTS.

1. *Contracts—Commissions—Brokers.*—A. wishing to borrow money on some property applied to B., who agreed to find a lender, and to have the title examined, and would charge \$200, which would include the expenses of examining the title and his commission; A. gave B. his title deeds at the time. A defect being found in the title, the lender refused to loan the money, and B. sued A. for the \$200. *Held*, that B. should have first examined the title before ap-

CONTRACTS. Continued.

- plying for a loan, and was his agent for that purpose, as well as for procuring a loan, and was not entitled to his commissions.—*Budd, et al., v. Zoller*, 238.
2. *Contracts—Commissions—Brokers.*—A broker, employed to effect a loan, is entitled to his commission, when he has found a lender, who has the money and who approves of the security, unless his rights are varied by special contract. There is always an implied condition that the borrower will show a good title.—*Id.* *PER EWING and WAGNER, Judges, dissenting.*
 3. *Contracts—Real estate agents—Commissions, when entitled to.*—If property is put into the hands of a real estate agent to sell, he is entitled to his commission, if the sale is brought about by his advertisements or exertions, or if he introduces the purchaser or discloses his name to the seller, and through such introduction or disclosures the sale is effected, even though the sale may be made by the owner.—*Tyler v. Parr*, 249.
 4. *Contracts—Made in one country, and ratified in another—What law controls.*—If a contract is made in one State and to be fulfilled there subject to ratification by a party in another State, when ratified the contract is to be interpreted by the laws of the first State.—*Golson v. Ebert*, 260.
 5. *Broker—Real estate—Commissions—Default of owner.*—A broker who negotiates a sale of real estate is entitled to his commissions, though, owing to the default of his employer, the sale is never effected.—*Carpenter v. Rynders*, 278.
 6. *Partners—Articles of Agreement—Interpretation of.*—In the articles of co-partnership it was agreed, that in the case of the death of one partner, the other should have the right to recover the fourth part of a certain chattel and against that he shall pay to the deceased the sum of one thousand dollars, after the deceased shall have paid all his debts which he owes to the partnership up to the date. *Held*, that this clause gave the surviving partner an option of purchase, and did not import an absolute covenant or engagement.—*Scharinghausen v. Luebsen*, 337.
 7. *Contracts—Interpretation of—Agents.*—A. professing to act for himself and for B. and C., makes a contract under seal with D. agreeing, that he will do certain work for D., for which D. agrees to pay him, and the contract concludes, that the undersigned bind themselves in the penal sum of one thousand dollars for its fulfillment. A. and D. alone sign the contract. Upon a suit for not doing the work; *Held*, that A. alone was liable.—*Einstein v. Holt* 340.
 8. *Practice, civil—Pleadings—Contracts—Common counts.*—Where work is done or services rendered under a special contract, and nothing remains to be done, except for the defendant to pay the money agreed on, the plaintiff can sue on the common counts in assumpsit.—*Stout v. St. Louis Tribune Co.*, 342.
 9. *Laws—Contracts, obligations of—Parties in interest—Third parties.*—If a law impairs the obligations of contracts, the persons injuriously affected thereby are the proper parties to apply to set it aside; third parties have no standing in court for such purposes.—*City of St. Louis v. Shields*, 351.
 10. *Evidence—Contracts in writing—Parol testimony affecting.*—Parol testimony is inadmissible to vary the language of a written contract; no other words are to be added to it, or substituted in its stead.—*Huse, et al. v. McQuade*, 388.
 11. *Presumptions—Contracts—Violation of law.*—When a contract can be performed without any violation of law, it is the legal presumption that it will be so performed, or at least there is no presumption that it will not be so performed.—*Sheffield, et al. v. Balmer, et al.*, 474.
 12. *Contracts—Promissory notes—Signature—Descriptio personae—Ambiguity—Parol evidence.*—If there is an ambiguity in a contract in writing, or a promissory note, in the description of the person, parol evidence is admissible to afford an explanation thereof, and to show upon whom the responsibility of the note shall rest, and for whose benefit the contract was made; and if a contract

CONTRACTS. Continued.

and a note refer in their terms to each other, both may be taken together in construing them.—*Washington Mutual Fire Insurance Company v. St. Mary's Seminary*, 480.

13. *Corporations—Officers—Act of Authority presumed.*—The authority of the chief officer of a corporation to perform certain official acts, may be proven by co-temporaneous or subsequent evidence of special authority.—*Id.*

14. *Contracts—Covenants, dependent—Consideration.*—Covenants in a contract are dependent, which are mutual and go to the entire consideration.—*Butler, Admr. v. Manny*, 497.

See, Accord and Satisfaction, 1; Administration, 4; Bonds; Constitution of Missouri, 2; Conveyances; Frauds, Statute of, 1; Insurance, Fire; Insurance, Life; Landlord and Tenant, 1; Practice, civil—Pleading, 12, 16; Practice civil, Trials, 17.

CONVEYANCES.

1. *Deed—Judgment—Variance not fatal, when.*—A Sheriff's deed is not invalid because it recites a judgment against Smith & Haliburton, while the record in the cause shows a judgment against Jacob Smith and Wesley Haliburton.—*Union Bank v. McWharters*, 34.

2. *Land and land titles—Conveyances—Husband and wife—Joint-tenancy.*—A conveyance of real estate in fee to husband and wife creates a tenancy by the entirety with the right of survivorship.—*Garner v. Jones*, 68.

3. *Conveyances—Interpretation—Intention—Verbal arrangement.*—When a grantor in a deed uses apt words showing what it was his intention to convey, that effect will be given to the deed, regardless of any verbal position or arrangement. [*Rutherford v. Tracy*, 48 Mo. 325, affirmed.]—*Bruensmann v. Carroll*, 313.

4. *Conveyances—Deed executed without the grantee being named—Parol authority to fill in name of grantee—Validity.*—A deed regularly executed in other respects, with a blank left therein for the name of the grantee, and placed in that condition in the hands of a third person, with verbal authority, but no authority under seal, from the person who executed it to fill up the blank in his absence and deliver the deed to the person whose name is inserted as grantee, when so filled out and delivered is a valid deed.—*Field v. Stagg*, 534.

See, Fraudulent Conveyances.

CORPORATION.

1. *Practice, civil—Note—Suit on—Allegation that plaintiff is a corporation, when necessary.*—In a suit by a corporation on a promissory note given to it in its corporate capacity by defendant, it is not ground of demurrer that plaintiff failed to allege that it was, at the date of the note, a corporation, etc. Defendant having entered into the contract with the company in its corporate name, thereby admitted it to be duly constituted a body politic and corporate.—*Farmers and Merchants Insurance Co., v. Needles*, 17.

2. *Corporations—Stockholders—Constitution—Individual Liability—Repeal—Obligation of contracts.*—The amendment to the Constitution of Missouri adopted Nov. 8th, 1870, which repealed the 6th section of Art. 8th of the then existing Constitution, whereby stockholders in corporations became liable for double the amount of stock they owned, and declared that all laws, ordinances and provisions, inconsistent with said amendment should be forever abolished and of no effect, did not have the effect of removing the individual liability of one who was a stockholder when the debt was incurred and also when the execution was issued against the corporation. Giving this amendment such effect would make it impair the obligation of contracts, because first, the creditor contracted with the corporation on the faith of the individual responsibility of the stockholders, and secondly, the remedy is so seriously affected that the obligation is impaired.—*Provident Savings Institution v. The Jackson Place Skating and Bathing Rink*, 552.

3. *Corporations—Double liability of stockholders—Transfer of stock.*—A stockholder cannot escape his liability under the former double liability clause

CORPORATION. Continued.

of the constitution of the state, by transferring his stock in the corporation to an insolvent, or with a view of exonerating himself from his personal responsibility.—*Provident Savings Institution, v. The Jackson Place Skating and Bathing Rink*, 557.

4. *Corporations—Dissolution—Insolvency—Stockholders, liability of.*—A corporation which is insolvent, and has been adjudicated a bankrupt under the United States Bankrupt Act, is dissolved; and a dissolution so brought about is sufficient to authorize creditors to bring suits against its stockholders under the statute (W. S., 293, § 22,) without joining the company in the suit.—*State Savings Association of St. Louis, v. Kellogg, et al.*, 583.

5. *Corporations—Insolvency—Suits against shareholders—Suit against corporation, not necessary, when.*—The statute, which provides that stockholders shall not be personally liable for any debt contracted by the corporation, unless suit shall be brought against the corporation within one year after the debt becomes due, (W. S., 336 § 13) does not apply when the corporation has been dissolved by bankruptcy. Such suit against the corporation would be a useless form, and the law will not enforce an act which would be frivolous.*Id.*

See Banks and Banking; Contracts, 13; Corporations, municipal.

CORPORATIONS, MUNICIPAL.

1. *Laws—Legislature—Power to alter or repeal—Municipal Corporations.*—Legislatures can alter or repeal at will all acts affecting or giving power to municipal corporations, unless the language of the act is too clear to admit of a doubt that they parted with that power.—*City of St. Louis, v. Shields*, 351.

See St. Louis, City of; Schools and school lands, 3.

COSTS; See Garnishment, 2; Practice, Civil, 3; Practice, Criminal, 1, 13.

COUNTER-CLAIM; See Practice civil, Pleading, 12.

COURTS, COUNTY; See Revenue, 1, 2, 3, 5; Schools and School lands, 1, 3, Statute, construction of, 4.

COURT OF CRIMINAL CORRECTION; See Practice, Criminal, 9.

CRIMES AND PUNISHMENTS.

1. *Practice, criminal—Criminal prosecution—Language, loud and abusive*—Disturbing the peace of a single individual by loud and abusive language, is not a criminal offense.—*State v. Schlottman*, 164.

See Practice Criminal.

CRIMINAL LAW, See Crimes and Punishments; Practice Criminal.

CUSTOM.

1. *Custom—To be binding must be actually known, or universal and notorious.*—A person is not bound by a custom unless he has personal knowledge thereof, or it is so notorious, universal and well established that his knowledge thereof would be conclusively presumed.—*Walsh v. Mississippi Valley Transportation Co.*, 434.

D.

DAMAGES.

1. *Practice civil, pleadings—Allegations—Damages—Remoteness.*—Where in a petition for conversion of a carpet bag containing plaintiff's clothes, plaintiff, as one cause of action, alleged that in consequence of such conversion, he, a laboring man, was compelled to work in unsuitable clothes, which were damaged thereby. *Held*, that such an allegation could only be made and proved as special damages under the count for conversion, and such damages were too remote.—*Saunders v. Brosius*, 50.
2. *Servants—Negligence of co-servants—Master, liability of.*—The master is not liable for injuries received by a servant, caused by the negligence of a co-servant, unless the latter is not possessed of the ordinary skill and capacity for

DAMAGES. Continued.

- the business intrusted to him, and unless his employment is attributable to the want of ordinary care on the part of the master.—*Brothers v. Cartter, et al.*, 372.
3. *Master—Delegation of his authority—Injury to servant.*—When a master delegates to a superintendent the power to employ and discharge servants and to provide and remove material, which duties adhere to him as master, he thereby makes himself liable for any injuries sustained by his servants, caused by the lack of care, or negligence of such superintendent. *Id.*
4. *Damages for personal injuries—Negligence—Contributory negligence.*—In an action for damages for personal injuries the rule is, that although the plaintiff may have failed to exercise ordinary care and diligence and such failure contributed in a remote degree to the injury, yet if defendant was guilty of negligence, which was the immediate cause of the injury, and with the exercise of ordinary prudence and care by defendant the injury could have been prevented, defendant is liable. But if plaintiff could have avoided the injury by the exercise of ordinary care and prudence, defendant is not liable. And this principle is not confined to any particular class or classes of persons.—*Walsh v. M. V. Trans. Co.*, 434.
5. *Practice, civil—Petition—Amendment when relates back—Limitations.*—When an amendment to a petition in a suit for damages, (W. S. 519, § 2) sets up no new matter or claim, but is merely a variation of the allegations affecting a demand already in issue—as where by the original petition a party was assigned to the wrong side of the case, and the mistake was corrected—it relates to the commencement of the suit, and the running of the statute of limitations is arrested at that point. (*Buel v. St. Louis Transfer Co.*, 45 Mo. 562, affirmed.)—*Crockett, et al.*, v. *St. Louis Transfer Co.* 457.
6. *Damages—Suit for, under statute—Father and mother as plaintiff, divorce of.*—In a suit for damages under the statute, (W. S. 520, § 2,) the father and mother of the deceased child may join as plaintiffs although divorced prior to the accrument of the cause of action. (*Buel v. St. Louis Transfer Co.*, 45 Mo. 562, affirmed.) *Id.*
7. *Practice, civil—Pleading—Statement of cause of action.*—The petition alleged that the defendant, a railroad company, negligently and carelessly ran over and killed some of the cattle of the plaintiff, and that the same was done at a part of the road that was not enclosed by a lawful fence, and that was not a public road crossing. *Held*, that the petition set out a good cause of action.—*Aubuchon v. St. Louis & I. M. R. R. Co.*, 522.
- See Constables, 3; Mechanics' Lien, 1; Mortgages and Deeds of Trust, 2; Practice, civil, Pleadings, 12.
- DECLARATIONS; See Estoppel; Evidence.
- DEFAULT; See Practice, civil, Pleading.
- DESCRIPTIO PERSONÆ; See Contracts, 12.
- DISTURBING THE PEACE; See Crimes and Punishments, 1; Practice, Criminal, 9.
- DIVORCE; See Husband and Wife; Practice, Criminal, 10.
- DOWER.
1. *Dower—Married woman not estopped from claiming, when.*—The fact that a married woman was made a party to the record in a suit for the partition of lands of her former husband, and for the assignment of her dower therein, will not estop her from afterward denying and contesting the validity of those proceedings.—*Crenshaw v. Creek, et al.*, 98.
- DURESS; See Practice, civil, Actions, 1.

E.

ENGINEER, CITY; See *St. Louis, City of*, 1, 3.

EQUITY.

1. *Practice, civil—Equity, bills in—Parties—Courts, County, acts of—Tax-payers rights of—Attorney General.*—Tax-payers can file bills in equity to annul illegal acts of County Courts, when such acts will increase the taxation, and the State is not a necessary party to such suits.—Newmeyer, et al., v. Mo. & Miss. R. R. Co. et al., 81.
2. *Practice, civil, pleading—Equity—Fraud—Account—Multiplicity of suits, &c.—Jurisdiction.*—Where A. filed a bill in equity, alleging that he had demised premises to B. with the agreement that near the end of the lease. A. and B. were each to appoint an assessor, and they a third, who should unanimously assess the value of the improvements and the yearly rental, and that A. should then have the privilege of buying the improvements or should grant a renewal of the lease at the rental so fixed, and with the old covenants, and that B. had always appointed partial assessors so that no unanimous decision could be obtained, and had occupied the premises for a number of years since the expiration of the original lease without paying any rent; *Held*, that the bill was proper, and equity would entertain the suit on account of fraud, account, and the prevention of the multiplicity of suits.—Biddle v. Ramsey, 153.
3. *Equity—Cloud on title—Possession, lack of.*—A party not in possession cannot go into equity to have a cloud removed from his title as against one in possession holding under a deed.—Clark v. Covenant M. Ins. Co., 272.
4. *Equity—Cloud on title—Record—Defect apparent.*—When the opposite party can only claim title through the record, and a defect appears upon the face of such record, there is no cloud on the title such as will call for the exercise of the equitable power of the court.—*Id.*
5. *Equity—Cloud on title—Record—Extrinsic evidence.*—Where the opposite party can claim title only through the record, and there is no defect apparent on the record, but such defect may be cured by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it, there is a cloud on the title.—*Id.*

See Arbitration and Award, 2; Bills and Notes, 1; Execution, 1 2; Judgments, 1; Land and Land Titles, 7, 8, 9; Trusts and Trustees.

ESCROW; See Bonds, 1, 2.

ESTOPPEL.

1. *Estoppel—Creditors—Partnership—Debt of one partner—Deeds of composition.*—A co-partnership conveyed all their assets to trustees for the benefit of their creditors, in pursuance of a resolution adopted at a meeting of the creditors. At that meeting a creditor of one of the partners was present, and by consent of all, his debt was admitted as a partnership debt. *Held*, that the creditors were afterwards estopped to deny that that debt was a partnership debt.—Diermeyer v. Hackman, 282.
2. *Estoppel—Declarations of owner.*—A. did blacksmithing for B. and procured a judgment against B. for the same, part of which was for shoeing a horse, which B.'s son brought to his shop to be shod, telling A. that the horse belonged to his father. The constable under this judgment levied on this horse. The son sued the constable on his bond for levying on the horse, claiming it as his own. *Held*, that the son was not estopped from denying his former assertion.—State v. Laies, 396.

See Banks and Banking, 2.

EVIDENCE.

1. *Evidence—Proof of contents of writing.*—The statement by a witness that a letter is lost or mislaid, and that to the best of his belief he has destroyed it, is sufficient foundation for evidence of its contents.—Meyers v. Russell, 26.
2. *Evidence—Husband and Wife—Witnesses—Communications.*—Communications between husband and wife are privileged and neither can testify concerning such.—Berlin v. Berlin, 151.
3. *Evidence—Divorce—Witnesses—Husband and Wife—Competency.*—Husbands and wives are competent witnesses against each other in divorce suits. [Moore vs. Moore, 51 Mo., affirmed.] *Id.*

EVIDENCE Continued

4. *Evidence—Witnesses—Opinion, when admissible.*—Opinions of witnesses are admissible, when the subject of inquiry is so indefinite and general in its nature as not to be susceptible of direct proof, or if the witness has had the means of personal observation, and the facts and circumstances upon which he bases his conclusion are incapable of being detailed so intelligibly as to enable any one but the observer himself to form an intelligent conclusion from them. —*Eyerman vs. Sheehan, et al.*, 221.
5. *Evidence—Prices current—Secondary evidence.*—A price current of the prices in a city is only secondary evidence, and not the best evidence obtainable. —*Gilsom Ebert*, 260.
6. *Evidence—Contracts in writing—Parol testimony affecting.*—Parol testimony is inadmissible to vary the language of a written contract; no other words are to be added to it, or substituted in its stead. —*Huse, et al.*, v. *McQuade*, 388.
7. *Common Carrier—Action against, for goods lost—Value of goods—Evidence.*—In the trial of a suit against a carrier for the value of a chest and its contents, which were enumerated in the petition, a witness after stating the value in detail, of a number of articles was asked if she knew the value of the chest and contents, and answered that she did, and named the value at \$400.00. She also stated that besides the articles she had specifically mentioned, there were some others which she had not named. This statement was not made in answer to any question asked her, but in connection with her testimony relating to the contents of the chest. *Held*, that an objection to her testimony on the ground that there was evidence tending to show that there were more goods in the chest than were sued for, was not well taken. —*Seyfarth v. St. Louis & Iron M. R. R. Co.* 449.
8. *Common Carrier—Suit against for goods lost—Evidence of value.*—In a suit against a common carrier for the value of household goods lost, it is competent for plaintiff to ask a witness as to value, whose opinion is based upon a knowledge of the articles lost, and not on his skill as an expert, his opinion as to their value in bulk. The plaintiff is not obliged to restrict the examination to the value of each article, and in that way arrive at their total value; nor is it incumbent on him to show the process by which the conclusion of the witness is reached. —*Id.*
9. *Bonds, official—Suits—Evidence—Account—Public and private transactions.*—A., the Marshal of St. Louis County, sued B., the Clerk of St. Louis Criminal Court, and his sureties, on his official bond for fees collected by B. as such clerk, belonging to A. A. offered in evidence, a written statement of their accounts, official and private, given to him by B. *Held*, that this statement was admissible in evidence, if the official and individual items could be separated therein, and that the court should instruct the jury to disregard the individual items, —*State v. Dailey, et al.*, 601.
See Agency, 4; Carriers, 3; Contracts, 12, 13; Custom, 1; Land and Land titles, 6, 8, 9, 10; Practice, civil, Pleading, 14; Practice, civil—Trials, 2, 8, 11, 12, 16, 17, 18, 20, 21; Practice, Criminal, 2, 8, 12; Practice, Supreme Court, 3, 4, 5, 6; Statute, construction of, 9; Wills, 1.

EXECUTIONS.

1. *Execution—Land, repeated sales of, under—Difference in bids—Suit for, etc.*—Where land exposed for sale under an execution is bid off, but the money is not paid over, and the land is re-sold under the same execution, to the same bidder, but for a less sum, if the amount finally paid is sufficient to satisfy the judgment and costs, the defendant in execution will be entitled to maintain a suit in equity for the difference in the bids. —*Strawbridge v. Clark*, 21.
2. *Lands, sale of—Successive liens on—Surplus funds—Belong to whom.*—Where there are several liens on a tract of land, and it is sold under one of them, the surplus after paying the lien under which it was sold, belongs in equity to the next subsequent liens, in the order of their priority. —*Id.*
3. *Sheriff—Execution, return of—Liability for interest—Demand.*—A sheriff is

EXECUTIONS. Continued.

not liable for interest upon the return of an execution, until a demand is made on him.—*Burgess v. Cave*, 43.

4. *Sheriff—Levy by—Excessive.*—A sheriff levied on a steamboat, worth about forty thousand dollars, by virtue of an execution for \$109. *Held*, that the levy was excessive; that he might have satisfied his execution by levying on a small part of the furniture.—*Silver, et al. v. McNeil*, 518.

See Constable, 1, 2, 3, 4; Estoppel, 2; Lease, 1, 2, 3.

EXPERTS; See Evidence.

F.

FEES; See Clerk, circuit; Circuit Attorney.

FENCES; See Damages, 8; Trespass, 1.

FORCIBLE ENTRY AND DETAINER.

1. *Practice, civil—Forcible entry and detainer—Title.*—In an action of forcible entry and detainer, the title to the land is not involved, but a forcible entry with or without title is forbidden.—*Dilworth v. Fee, et al.*, 130.
2. *Forcible entry and detainer, statute of—Appeal bond—Judgment against sureties.*—The statute concerning forcible entry and detainer does not contemplate a judgment on the appeal bond against the principal and sureties, as in ordinary appeals from justices of the peace. If the bond be not complied with, it may be sued on, but a summary judgment in the same suit has not been provided for.—*Gunn v. Sinclair*, 327.

FRAUD; See Fraud, Statute of; Fraudulent Conveyances.

FRAUDS, STATUTE OF.

1. *Contracts—Privity—Default of another—Statute of frauds.*—An agreement by A. to pay B. for work to be done for C. is not a contract to answer for the default of another, and need not be in writing.—*Sinclair v. Bradley*, 180.

FRAUDULENT CONVEYANCES.

1. *Fraudulent conveyances—Personal property—Change of possession—Bailees, notification to.*—A sale of personal property then in the hands of a bailee, followed by a notification to the bailee of such sale, is a sufficient change of possession as against the creditors of the vendor.—*How v. Taylor*, 592.
See Partnership, 4.

G.**GARNISHMENT.**

1. *Practice, civil—Garnishment—Construction of statute—Third parties interested.*—The provision of the statute (Revised Laws 1855, p. 260,) that if the garnishee show in his answer and declare his belief, that the debt owing by him to defendant or the supposed property in his hands has been sold or assigned to a third party, and the plaintiff disputes such facts, the court shall make an order upon the supposed vendee or assignee to appear, and sustain his claim, is directory.—*McKittrick v. Clemens, et al.*, 160.
2. *Garnishment—Allowance to garnishee cannot be made after term at which judgment is rendered.*—An allowance to a garnishee is a part of the costs in the case and cannot be granted after the term at which final judgment is rendered, either in the lower or appellate court.—*Ladd, et al. v. Couzins*, 454.

See Attachment, 1.

GUARDIAN AND WARD; See Infants.

H.

HUSBAND AND WIFE.

1. *Leads and land titles—Conveyances—Husband and wife—Joint tenancy.*—A conveyance of real estate in fee to husband and wife creates a tenancy by the entirety with the right of survivorship.—*Garner v. Jones*, 68.
2. *Evidence—Husband and wife—Witnesses—Communications.*—Communications between husband and wife are privileged and neither can testify concerning such.—*Berlin v. Berlin*, 151.
3. *Evidence—Divorce—Witnesses—Husband and wife—Competency.*—Husbands and wives are competent witnesses against each other in divorce suits.—[*Moore v. Moore*, 51 Mo., affirmed.] *Id.*
4. *Damages—Suit for, under statute—Father and mother as plaintiff, divorce of.*—In a suit for damages under the statute, (W. S., 520, § 2.) the father and mother of the deceased child may join as plaintiffs although divorced prior to the accrual of the cause of action. (*Buel v. St. Louis Transfer Co.*, 45 Mo. 562, affirmed.)—*Crockett v. St. Louis Transfer Co.*, 457.
5. *Practice, civil—Parties—Husband to be joined with wife when the marriage has taken place after the commencement of the suit—Amendment, when made.*—When a suit has been begun by a woman who afterwards marries, the petition may be amended so as to make her husband a joint plaintiff; and such amendment under the statute (W. S., 1034,) may be made at any time before final judgment.—*Id.*
See *Dower*; *Infants*, 1; *Insurance, Life*, 1; *Judgments*, 3; *Lease*, 2; *Practice, Criminal*, 10.

I.

INFANTS.

1. *Infant—Sustenance—Step-father—Liability—In loco parentis.*—Merely by virtue of his marriage a man is not bound to provide for the children of his wife by a former husband, but if he holds them out to the world as a member of his own family, he stands *in loco parentis* to them, and incurs the same liability with respect to them, that he is under to his own children.—*St Ferdinand Loretto Academy v. Bobb*, 357.

INJUNCTION; See *Mortgages and Deeds of Trust*, 1.

INSTRUCTIONS; See *Practice, civil—Trials*.

INSURANCE, FIRE.

1. *Contracts—Conditions, waiver of—Insurance, policies of.*—A condition in a policy of insurance that any other insurance on such property should avoid that policy, unless the assent of the insurer to such increased insurance was indorsed on the original policy, may be waived by acts or positive declarations, and the insurer may be estopped to set up such forfeiture, when by a course of dealing or by open actions the insurer has induced the assured to pursue a policy to his detriment. [*Hutchins v. Western Insurance Company*, 21 Mo. 97, overruled.]—*Hayward*, assignee of *Lennon v. National Insurance Co.*, 181.

INSURANCE, LIFE.

1. *Insurance—Policies—Contracts of marriage.*—A woman engaged to be married to a man has an insurable interest in his life.—*Chisholm v. Nat. Capitol Life Ins. Co.*, 213.
2. *Contracts—Insurance—Premium, prompt payment of—Waiver.*—Though a contract of insurance requires prompt payment of the premium or the policy will be forfeited, yet the insurers may waive this condition by a habit of receiving the premium after it is due.—*Thompson v. St. Louis Mutual Life Ins. Co.*, 469.

INTERPLEA; See *Administration*, 1.

J.

JUDGMENTS.

1. *Judgments, assignment of—Statute—Equitable title.*—The statutory mode of assigning judgments is cumulative, and does not prevent a party from making an equitable assignment in any other lawful way.—*Burgess v. Cave*, 43.
2. *Judgments, assignment of—Execution—Sheriff, notice of assignment.*—If a sheriff with an execution in his hands, receive notice of the assignment of the judgment, he must hold the money when collected, for the use of the assignee.—*Id.*
3. *Judgments, assignment of—Husband and Wife—Power of disposition.*—The husband is the proper party to receive payment of a judgment in favor of himself and wife, or the money may be paid to the sheriff to be applied by him in favor of the husbands's execution creditor.—*Id.*

See Partnership, 5; Practice, civil, 2; Practice, civil,—Appeal, 1; Practice, Civil,—New Trials, 2; Practice, Civil,—Pleadings, 5; Sheriff's Sales, 4.

JURISDICTION; See Administration, 1; Attachment, 1; Practice, Civil, 1; Practice, Criminal, 9; Receiver, 1.

JURY; See Practice, civil—Trials, 2, 4; Practice, Criminal, 5, 6.

JUSTICES' COURTS.

1. *Justices' Courts—Appeal bond—Default, motion to set aside.*—When a judgment by default before a Justice of the Peace is appealed from, but no motion is made to set aside the default, the appeal bond given in such case is void.—*Garnet v. Rodgers, et al.*, 145.
2. *Justices' Courts—Appeal bonds—Default—Motion to set aside.*—Bonds given for appeals before Justices of the Peace, where judgment was given by default but no motion was made to set aside the default, are *coram non jure* and void. [*Garnet v. Rodgers*, p. 145 affirmed.] *Kinear v. Shands, et al.*, 326.
3. *Justices' Courts—Appeal—Time, computation of—Sunday.*—In computing the time limited for perfecting appeals from justices' courts, Sundays are to be included as other days. The principle of *dies non* does not apply in such cases.—*Patchin v. Bonsack*, 431.

See Landlord and Tenant, 3, 5, 6; Practice, Civil—Trials, 18.

JUSTICE OF THE PEACE; See Practice, Criminal, 9.

L.

LAND COMMISSIONER; See St. Louis, City of, 6, 7.

LAND AND LAND TITLES.

1. *Land and land titles—Conveyances—Husband and wife—Joint tenancy.*—A conveyance of real estate in fee to husband and wife creates a tenancy by the entirety with the right of survivorship.—*Garner v. Jones*, 68.
2. *Land and land titles—Vendor's lien—Taking other security—Fraud.*—When a purchaser by fraud induces the vendor to take worthless security for the unpaid purchase money for land, the vendor does not thereby waive his lien on the land.—*Skinner v. Purnell*, 96.
3. *Lands and land titles—Trespassers—Title by occupancy—Color of title.*—A mere trespasser can acquire title only to that portion of a tract which he occupies; to maintain an action against parties trespassing on another part of the tract, he must have actual possession of a part of the tract with color of title to the whole.—*Rannels v. Rannels, et al.*, 108.
4. *Lands and land titles—Limitations, statute of—Occupancy—Color of title—Writings and acts in pais.*—Whatever title would authorize a party in posses-

LAND AND LAND TITLES. Continued.

- sion of a part of a tract to maintain an action against a wrong-doer on the balance of the land, would be a sufficient color of title under the Statute of Limitations against the real owner; and this color of title may be created by an instrument of writing or by an act *in pais* without writing.—*Id.*
5. *Land and land titles—Color of title—Acts in pais.*—Where a man made a verbal gift of a defined tract of land to his sister, had it surveyed for her, and put her into the possession under this survey and the description in his own deed, *Held*, she was in possession of the whole tract under color of title.—*Id.*
 6. *Presumptions of law—Real estate, ownership of—Possession.*—The general presumption is, nothing appearing to the contrary, that the party who has the exclusive legal title to real estate, has also the possession.—*Clark, et al. v. The Covenant Mutual Life Ins. Co.*, 272.
 7. *Equity—Cloud on title—Possession, lack of.*—A party not in possession cannot go into equity to have a cloud removed from his title as against one in possession holding under a deed.—*Id.*
 8. *Equity—Cloud on title—Record—Defect apparent.*—When the opposite party can only claim title through the record, and a defect appears upon the face of such record, there is no cloud on the title such as will call for the exercise of the equitable powers of the court.—*Id.*
 9. *Equity—Cloud on title—Record—Extrinsic evidence.*—Where the opposite party can claim title only through the record, and there is no defect apparent on the record, but such defect must be proved by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it, there is a cloud on the title.—*Id.*
 10. *Evidence—Deed—Title—Grantor's interest.*—In showing title under a deed, or a cloud on a title through a deed, it is necessary to show that the grantor had some sort of title, either real or apparent.—*Id.*
 11. *Practice, civil, pleadings—Equity, bill in—Multifariousness.*—A bill in equity is multifarious, when distinct and independent matters are improperly joined; as several matters perfectly distinct and unconnected united in one bill against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill.—*Id.*
 12. *Land and land titles—Acts of Congress of June 13th, 1812, and May 26th 1824, granting commons to the villages of St. Louis and Carondelet—Reservation of commons—Decision in case of Carondelet vs. St. Louis, (1 Black., 179.)* Under the acts of Congress of June 13th, 1812, and May 26th, 1824, the city of Carondelet claimed certain lands as commons, and it became the duty of the President of the United States to reserve said lands from entry or sale; and said lands were thus reserved from entry or sale from the passage of said act of June 13th, 1812, till the decision of the United States Supreme Court in the case of Carondelet vs. St. Louis, decided at December Term 1861, of that court. Proper entries of such reservation were made at the local land office of St. Louis which gave due notice to all persons, thereof. It is thus established that said lands were reserved from entry or sale down to the said December Term 1861, of the United States Supreme Court.—*Shepley, et al., v. Cowan, et al.*, 559.
 13. *Land and land titles—Act of Congress of September 4th, 1841—Act of the General Assembly of Missouri accepting grant—Selection of land under said acts—Reservations.*—Under section 8 of an act of Congress approved September 4th, 1841, entitled "an act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," it was provided that there should be granted to certain States, Missouri among the number, five hundred thousand acres of land for purposes of internal improvements, and provided that the selection of such land should be made from any public land, except such as was or might be reserved from sale by any law of Congress or proclamation of the President of the United States. The General Assembly of Missouri passed certain acts accepting the five hundred thousand acres of land and providing for its selection. In 1849 the Governor of Missouri selected for

LAND AND LAND TITLES Continued.

plaintiff a part of the land which under the act of Congress of June 13th, 1812 had been reserved from entry or sale, and which was so reserved until December, 1861. *Held*, that said land being so reserved from entry or sale at the date of such selection was not of the character intended to be granted in the 8th section of the act of Congress of September 4th, 1841, and was not embraced in that section, and therefore such selection was null and void and no title could pass thereby to the State of Missouri, and the State could therefore pass none to the plaintiff.—*Id.*

14. *Land and land titles—Statute, construction of—Granting words.*—A statute which provides that "there shall be granted," etc., does not have the effect of making a grant. No title passes by the force of the act itself, the words imply that some other act is to be passed, before the Government parts with the fee to lands which it is provided shall be granted.—*Id.*

15. *Land and land titles—Lists certified by the Commissioner of the General Land Office—Land reserved—Act of Congress of Aug. 3rd, 1854.*—The act of Congress of Aug. 3rd, 1854, provided that "in all cases where lands have been or shall be hereafter granted by any law of Congress to any one of the several States or Territories, and when said law does not convey the fee simple title of such lands or require patents to be issued therefor, the lists of such lands which have been certified by the Commissioner of the General Land Office under the seal of said office, shall be regarded as conveying the fee simple of all the lands embraced in said lists that are of the character contemplated by such acts of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be null and void," etc. Under these provisions of said act, the Commissioner of the General Land Office issued under the seal of his office a certificate that the State had selected under the 8th section of the act of Congress of September 4th, 1841, certain land, which was reserved from entry or sale under the act of June 13th, 1812, and was reserved from entry or sale at the time the certificate was dated, and which had been selected by the State of Missouri under the law of September 4th, 1841, which excluded from such selection land which had been reserved from entry or sale. *Held*, that such certificate of the commissioner was null and void and conveyed no title.—*Id.*

16. *Limitation, statute of—Not only bars but transfers titles—Does not run against the Government.*—The statute of limitations is a statute of repose. It not only bars, but may transfer a title. The statute does not run against the Government.—*Id.*

See Conveyances; Execution, 1, 2; Forcible entry and detainer, 1; Sheriffs' sales, 3, 4.

LANDLORD AND TENANT.

1. *Leases—Assignment—Rent.*—One, who receives an absolute assignment of a lease, is liable to the lessor for rent.—*Willi v. Dryden*, 319.
2. *Landlord and tenant—Monthly tenancy—Notice of termination.*—In order to terminate a tenancy from month to month, the required notice must be given at or before the termination of the current month.—*Gunn et al. v. Sinclair*, 327.
3. *Constable—Sales—Leaseholds having less than three years to run.*—A leasehold having less than three years to run, can be sold under an execution from a Justice of the Peace. *Id.*
4. *Husband and Wife—Leasehold, ownership of—Sale in invitum.*—A leasehold, of which the wife is merely the legal owner, belongs by marital right to the husband, and can be sold in invitum proceedings against him. *Id.*
5. *Landlord and tenant—Leasehold—Purchase by tenant.*—When a tenant purchases the leasehold of his landlord at an execution sale against his landlord, he thereby extinguishes the tenancy. [W. S., 880, § 15.] *Id.*
6. *Forcible entry and detainer, statute of—Appeal bond—Judgment against sure-*

**LANDLORD AND TENANT Continued.**

ties.—The statute concerning forcible entry and detainer, does not contemplate a judgment on the appeal bond against the principal and sureties, as in ordinary appeals from justices of the peace. If the bond be not complied with, it may be sued on, but a summary judgment in the same suit has not been provided for. *Id.*

See Forcible Entry and Detainer.

LEASE.

1. *Constable—Sales—Leaseholds having less than three years to run.*—A leasehold having less than three years to run, can be sold under an execution from a Justice of the Peace.—*Gunn v. Sinclair*, 327.
2. *Husband and Wife—Leasehold, ownership of—Sale in invitum.*—A leasehold, of which the wife is merely the legal owner, belongs by marital right to the husband, and can be sold *in invitum* proceedings against him.—*Id.*
3. *Landlord and tenant—Leasehold—Purchase by tenant.*—When a tenant purchases the leasehold of his landlord at an execution sale against his landlord, he thereby extinguishes the tenancy. [W. S. 880, § 15.]—*Id.*

See Landlord and Tenant.

LEGISLATURE.

1. *Laws—Legislature—Power to alter or repeal—Municipal Corporations.*—Legislatures can alter or repeal at will all acts affecting or giving power to municipal corporations, unless the language of the act is too clear to admit of a doubt that they parted with that power.—*St. Louis v. Shields*, 351.

See Statute, construction of, 1, 2, 3.

LEVY; See Executions.

LICENSE; See Revenue, 4, 5, 6, 7; Statute, construction of, 4.

LIENS, MECHANICS'; See Mechanics' Liens.

LIENS, VENDORS'; See Vendors' Liens.

LIMITATIONS.

1. *Statute of Limitations—Bills and notes—Suits thereon by a stranger.*—When the statute of limitations is appealed to as a defense against a note, evidence that a suit was instituted thereon within the ten years by a stranger to the note, is inadmissible.—*Tiffin v. Leabo*, 49.
2. *Limitations, statute of—Sheriff—False return—When the statute begins to run.*—Where a sheriff falsely returns that he has served the defendant to a suit, he thereby commits a fraud against such defendant, and the Statute of Limitations does not begin to run from the time of such return. (2 W. S., p. 920, § 24.)—*Foley v. Jones*, 64.
3. *Lands and land titles—Limitations—Statute of—Occupancy—Color of title—Writings and acts in pais.*—Whatever title would authorize a party in possession of a part of a tract to maintain an action against a wrong-doer on the balance of the land, would be a sufficient color of title under the Statute of Limitations against the real owner; and this color of title may be created by an instrument of writing or by an act *in pais* without writing.—*Rannels v. Rannels*, 108.
4. *Limitations, statute of—Note—Partial Payment—Indorsement.*—An indorsement of partial payment, made on a note by the holder without the privity of the maker, is not of itself sufficient evidence of a payment to repel a defense created by the Statute of Limitations; but such indorsement made by the consent of the maker is sufficient.—*Phillips v. Mahan*, 197.
5. *Limitations, statute of—Trusts, express—Denial of trust.*—In express technical trusts, the statute of limitations does not begin to run, until the trust is denied by some open act of the trustee.—*Smith v. Ricords*, 581.
6. *Limitations, statute of—Trusts, implied—Right of action.*—In implied trusts, the statute of limitations begins to run as soon as the party has a right to commence a suit to declare and enforce the trust. *Id.*

See Land and Land Titles, 16; Practice, civil—Pleading, 17.

LOST WRITING ; See Evidence, 1.

M.

MANDAMUS ; See Practice, civil—Pleading.

MASTER AND SERVANT ; See Damages, 2, 3.

MECHANICS' LIENS.

1. *Mechanics' Liens—Judgment—Removal of buildings—Action for prevention—St. Louis County.*—If the owner of property in the County of St. Louis prevents the purchaser of a building thereon, under a judgment on a mechanic's lien, from removing the building, his proper remedy is an action of damages against the owner of the property.—*Seibel v. Siemon*, 363.
2. *Mechanics' lien—To what attaches.*—A mechanic's lien only attaches to such property and fixtures as form part of the realty. (W. S., 907-8, §§ 1-4)—*Haeussler v. Mo. Glass Co.*, 452.

MONEY PAID.

1. *Duress—Payment of money—When recoverable.*—Payment of money upon an illegal and unjust demand, when the party is advised of all the facts, can only be considered involuntary, when it is made to procure the release of the person or property of the party from detention, or where the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it.—*Wolfe, et al. v. Marshal, et al.*, 167.

MORTGAGES AND DEEDS OF TRUST.

1. *Trusts and Trustees—Deed of Trust, sale under—Injunction—Damages, release of—Cestui que trust.*—In a suit for damages on an injunction bond, given to prevent the sale of land under a deed of trust, the *cestui que trust* is the only person damaged by the injunction, and he alone can execute a release for the damages.—*O'Reilly v. Miller*, 210.
2. *Mortgages and Deeds of Trust—Sales—Advertisement—St. Louis Legal Record—Publication in, imparted notice.*—The St. Louis County Legal Record and Advertiser was a newspaper, for the purpose of publishing judicial notices, and an advertisement in that paper of a sale under a Deed of Trust, imparted notice, and satisfied the requirement of the deed. (*Kellogg v. Carrico*, 47 Mo. 157, affirmed.)—*Benkendorf v. Vincenz, et al.*, 441.
3. *Mortgages and Deeds of Trust—Sale under Deed of Trust—Sale of property in a lump, not per se sufficient to invalidate sale.*—The mere fact that property conveyed by Deed of Trust is sold under the deed, in gross, is not *per se* sufficient to invalidate the sale. There must be some attendant fraud or unfair dealing or abuse of the confidence reposed in the trustee, in order to obtain the aid of a court of equity to divest a title acquired under such a sale.—*Id.*
4. *Trustee's sale—Personal property—How attacked.*—The sale of a trustee under a deed of trust of personal property, can only be attacked by a suit in equity to set it aside by the grantor in the deed of trust, or one claiming under him.—*Haeussler v. Missouri Glass Company*, 452.

N.

NEGLIGENCE ; See Carriers, 2, 3 ; Damages ; Practice, civil—Trials, 7.

NOTARY PUBLIC.

1. *Notary Public—Certificate—Alteration—Seal.*—The seal of a Notary Public attesting his certificate, need not be impressed upon wax ; it is sufficient if it be impressed upon the paper.—*Meyers v. Russell*, 26.
See Practice, criminal, 14.

NUISANCES ; See Constitution of Missouri, 2.

O.

OFFICERS.

1. *Statute, construction of—Quo Warranto—Attorney General, information by—Act of Feb. 21, 1873.*—The act of Feb. 21, 1873, prohibiting the drawing or paying of a warrant for the salary attached to a State office, when said office is contested or disputed by two or more persons claiming title thereto, or by information in the nature of *quo warranto*, does not apply to an information filed by the attorney general *ex-officio*.—State, *ex rel.*, v. Clark, 508.
2. *Officers, State—Commission—Salary—Liability—Ouster.*—He, who has the commission, is entitled to the emoluments of the office, until the State by proper proceedings revokes his authority; and the party properly entitled to the office has no recourse against the State for payments so made, but his recourse is against the person who so received the emoluments.—*Id.*
See Bonds, Official; Clerk, Circuit; Constable; Contracts, 13; Courts, County; Justices of the Peace; Notary Public; Revenue, 2, 3; St. Louis, city of, 1; Schools and School Lands, 3.

OPINIONS; See Evidence, 4.

ORDINANCES, CITY; See Statute, construction of, 6, 7, 8, 9.

P

PARTITION; See Dower, 1.

PARTNERSHIP.

1. *Estoppel—Creditors—Partnership—Debt of one partner—Deeds of composition.*—A co-partnership conveyed all their assets to trustees for the benefit of their creditors, in pursuance of a resolution adopted at a meeting of the creditors. At that meeting a creditor of one of the partners was present, and by consent of all, his debt was admitted as a partnership debt. *Held*, that the creditors were afterwards estopped to deny that that debt was a partnership debt.—Diermeyer v. Hackman, 282.
2. *Partnership—Notes—Dissolution—Power of one partner to bind the others.*—One partner after dissolution of the firm, with notice thereof to the creditor, cannot bind the other partners by making a note in the name of the firm, even in renewal of a note of the firm.—Moore, *et al.*, v. Lackman, 323.
3. *Partners—Articles of agreement—Interpretation of.*—In the articles of co-partnership it was agreed, that in the case of the death of one partner, the other should have the right to recover the fourth part of a certain chattel and against that he shall pay to the deceased the sum of one thousand dollars, after the deceased shall have paid all his debts which he owes to the partnership up to the date. *Held*, that this clause gave the surviving partner an option of purchase, and did not import an absolute covenant or engagement.—Scharringhausen, Adm. v. Luebsen, 337.
4. *Sales—Personal property—Partnership—Change of possession.*—A. being in partnership with B. & C., sold his interest in the firm to B. & C. but remained with the new firm as their employee; *Held*, that no further change of possession was necessary to render the sale valid as to the creditors of A.—Criley, *et al.* v. Vasei, 445.
5. *Practice, civil—Slander—Partners—Joint judgment—Individual suit—Bar.*—A joint judgment, procured by partners in business in a slander suit, is no bar to a several suit by one of the partners on the same cause of action.—Duffy v. Gray, 528.
6. *Bills and Notes—Partnership—Death of partner—Renewals—Liability of estate of deceased.*—A. died, leaving the firm of which he was a member indebted to B. which debt was witnessed by notes. These notes were afterwards given up, and other notes in renewal thereof taken, but the creditor stipulated,

PARTNERSHIP Continued.

that such action should not discharge the estate of A. *Held*, that A.'s estate was still liable either as on a balance of the original debt, or of the surrendered notes.—*Boatmen's Savings Institution v. Mead*, Admr. 543.

8. *Bills and notes—Renewal by surviving partner—Protest.*—A., B. and C., while partners indorsed certain promissory notes, A. died before the notes matured. At the maturity of the notes, part of the amount was paid by the maker, and renewal notes were given for the remainder, which were indorsed by B. and C., with the former firm name, and the original notes were surrendered up to the makers and destroyed. The original notes were not protested, nor were any steps taken to hold A.'s estate upon them. *Held*, that A.'s estate would not be held liable for the amount unpaid on the original notes, nor on the renewal notes; and it makes no difference that the holder of the notes had an understanding with B. and C., that the renewal notes were not taken in satisfaction of the original debt.—*Central Savings Bank v. Mead*, Admr. 546.
See Bills and Notes, 4.

PAYMENT; See Accord and Satisfaction, 1.

POSSESSION; See Land and Land Titles, 1, 2; Partnership, 4.

PRACTICE, CIVIL.

1. *Practice, civil—Defendant, appearance of to have case put at foot of docket, etc.*—The appearance of a party for the purpose of having his case put at the foot of the docket gives the court such jurisdiction as to authorize the rendition of a personal judgment against him.—*Orear v. Clough*, 55.
2. *Practice, civil—Orders, nunc pro tunc—Subsequent terms—Record.*—Where a Court fails to make an order, it cannot be made at a subsequent term *nunc pro tunc*; but where the clerk fails to enter judgment, or enters up the wrong judgment, the Court may at any time order the proper entries to be made, but the record should show the facts which authorize the entries.—*Priest*, Admr., of *Smarr v. McMaster*, 60.
3. *Practice, civil—Circuit Court—Costs, security for—Time allowed.*—When by order of court a party is allowed a certain number of days wherein to file security for costs, such order refers to calendar days, and not days of the term of the court. *Swainson, et al. v. Bishop*, 227.

PRACTICE, CIVIL,—ACTIONS.

1. *Duress—Payment of money—When recoverable.*—Payment of money upon an illegal and unjust demand, when the party is advised of all the facts, can only be considered involuntary, when it is made to procure the release of the person or property of the party from detention, or where the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it. *Wolfe, et al. v. Marshal, et al.*, 167.
See Corporations, 4, 5; Mechanics' Liens, 1; Partnership, 5.

PRACTICE, CIVIL—APPEAL.

1. *Judgment not final—Appeal dismissed.*—An appeal brought up without final judgment will be dismissed.—*State v. Martindale*, 31.
See Justices' courts, 1, 2, 3; Practice, civil—Trials, 18; Practice, Supreme Court.

PRACTICE, CIVIL—NEW TRIALS.

1. *New trial—Objections, not appearing—Result.*—Objections not raised on motion for new trial will not be considered by the Supreme Court.—*Brady v. Connelly*, 19.
2. *Practice, civil—New trial, motion for—Verdict—Arrest of judgment, motion in.*—An objection to a general verdict on a petition containing two counts, that it does not specify the amount found due on each count, will not be considered by this court, if it was not alleged in the motion for a new trial or in arrest.—*Chapman v. White*, 179.
3. *Practice, civil—New trial, motion for—Objections presented—Consideration by Supreme Court.*—Objections to the action of the court below, must be pre-

PRACTICE CIVIL—NEW TRIALS Continued.

mented to that court on a motion for a new trial, or they will not be considered by the Supreme Court. *Burns v. Whelan*, 520.

4. *Practice, civil—New trials—Motions.*—The motion for a new trial must be made within four days after the trial, if the term shall so long continue, and if not, then before the end of the term.—*Moran v. January*, 523.

See *Practice, civil—Trials*, 12.

PRACTICE, CIVIL—PARTIES.

1. *Practice, civil—Petition—Amendment, when relates back—Limitations.*—

When an amendment to a petition in a suit for damages, (W. S., 519, § 2.) sets up no new matter or claim, but is merely a variation of the allegations affecting a demand already in issue—as where by the original petition a party was assigned to the wrong side of the case, and the mistake was corrected—it relates to the commencement of the suit, and the running of the statute of limitations is arrested at that point. (*Buel v. St. Louis Transfer Company*, 45 Mo., 562, affirmed.)—*Crockett, et al. v. St. Louis Transfer Co.*, 457.

2. *Damages—Suit for, under statute—Father and mother as plaintiff, divorce of.*—In a suit for damages under the statute, (W. S., 52, § 2,) the father and mother of the deceased child may join as plaintiffs although divorced prior to the accrual of the cause of action.—(*Buel v. St. Louis Transfer Co.*, 45 Mo. 562, affirmed.)—*Id.*

3. *Practice, civil—Parties—Husband to be joined with wife when the marriage has taken place after the commencement of the suit—amendment, when made.*—When a suit has been begun by a woman who afterwards marries, the petition may be amended so as to make her husband a joint plaintiff; and such amendment under the statute, (W. S., 1034,) may be made at any time before final judgment.—*Id.*

See *Contracts*, 9; *Dower*, 1.

PRACTICE, CIVIL—PLEADING.

1. *Practice, civil—Note—Suit on—Allegation that plaintiff is a corporation, when necessary.*—In a suit by a corporation on a promissory note given to it in its corporate capacity by defendant, it is not ground of demurrer that plaintiff failed to allege that it was, at the date of the note, a corporation, etc. Defendant having entered into the contract with the company in its corporate name, thereby admitted it to be duly constituted a body politic and corporate.—*Farmers & Mechanics' Insurance Co. to use, et c. v. Needles*, 17.

2. *Practice, civil—Counts—Verdict, etc.*—The rule that where a petition contains more than one count, there should be a separate verdict on each count, only applies where the counts are for separate and distinct causes of action.—*Brady v. Connelly*, 19.

3. *Practice Civil, pleadings—Allegations—Damages—Remoteness.*—Where in a petition for conversion of a carpet bag containing plaintiff's clothes, plaintiff as one cause of action, alleged that in consequence of such conversion, he, a laboring man, was compelled to work in unsuitable clothes, which were damaged thereby. *Held*, that such an allegation could only be made and proved as special damages under the count for conversion, and such damages were too remote.—*Saunders v. Brosius*, 50.

4. *Practice, civil, Pleading—Mandamus, alternative writ of—Petition—Statement, of case.*—In a petition for, and in the alternative writ of mandamus, the relator should so set forth the facts upon which he relies for the relief sought, that the defendant may be able to take issue on them.—*State ex rel. v. Everett, et al.*, 89.

5. *Practice, civil—Pleading—Answer—Demurrer—Judgment by default.*—It is irregular to enter judgment by default after answer and demurrer to the answer. *Louthan v. Caldwell*, 121.

6. *Practice civil—Pleadings—Equity—Fraud—Account—Multiplicity of suits, etc.—Jurisdiction.*—Where A. filed a bill in equity, alleging that he had demised premises to B. with the agreement that near the end of the lease, A.

PRACTICE,—CIVIL—PLEADINGS—Continued.

- and B., were each to appoint an assessor, and they a third, who should unanimously assess the value of the improvements and the yearly rental, and that A. should then have the privilege of buying the improvements or should grant a renewal of the lease at the rental so fixed, and with the old covenants, and that B. had always appointed partial assessors so that no unanimous decision could be obtained, and had occupied the premises for a number of years since the expiration of the original lease without paying any rent; *Held*, that the bill was proper, and equity would entertain the suit on account of fraud, account, and the prevention of a multiplicity of suits.—*Biddle v. Ramsey*, 153.
7. *Practice civil Defenses, withdrawal of*—A party to a suit may at any time withdraw any defense set up by him.—*Boatmen's Savings Institution v. Forbes, et al.*, 201.
8. *Practice, civil, Pleadings—Notes—Sureties—Allegations*—When a party sets up as a defense against a note that he signed it as surety, he must state the name of the principal. *Id.*
9. *Practice civil, Pleadings—Sureties—Notes, extension of—Payments—Presumptions*—Where in the plaintiff's petition on a note it is alleged that payments were made after maturity, and the defendant claiming to be a surety alleges that the note was extended without his consent, but does not deny the payments, such failure to deny the payments is a presumption that they were made with his knowledge and consent, and will amount to a ratification of the agreement to extend the time of payment.—*Id.*
10. *Practice, civil, Pleading—Answer—Traverse of allegations of petition*—When the new matter set up in the answer amounts to a complete defense to the suit, it is not necessary to traverse any of the allegations of the petition.—*Kortendorfer v. City of St. Louis*, 204.
11. *Practice, civil, pleadings—Equity, bill in—Multifariousness*—A bill in equity is multifarious, when distinct and independent matters are improperly joined; as several matters perfectly distinct and unconnected, united in one bill against one defendant; or the demand of several matters of a distinct and independent nature against several defendants in the same bill.—*Clark v. Covenant Mut. Life Ins. Co.*, 272.
12. *Practice, civil, pleadings—Contracts—Counter-claims*—If the suit is founded on a cause of action connected in any way with a contract, a counter-claim arising out of any other contracts between the same parties, though sounding in damages, may be set up.—*Empire Transportation Co. v. Boggiano, et al.*, 204.
13. *Practice, civil—Pleadings—Verdict—Replication, nunc pro tunc*—If, where a replication was required, it was not filed, yet a court should not for that cause set aside a verdict, but should allow a replication of general denial to be filed *nunc pro tunc* to aid the verdict.—*Foley, et al. v. Alkire, et al.* 317.
14. *Practice, civil—Pleading—Averments—Common law—Code—Notes—Demand and Protest*—An averment of due demand and protest of a note was sustained at common law by proof of facts showing an excuse according to the law merchant, or dispensing with actual demand and showing due diligence, but it is not so by our Code. The facts proved must correspond with the averments.—*Pier et al. v. Heinrichoffen, et al.*, 333.
15. *Practice, civil—Pleadings—Code—Allegations—Facts constitutive*—Every fact which the plaintiff must prove to maintain his suit, is *constitutive* in the sense of the Code and must be alleged. *Id.*
16. *Practice, civil—Pleadings—Contracts—Common counts*—Where work is done or services rendered under a special contract, and nothing remains to be done, except for the defendant to pay the money agreed on, the plaintiff can sue on the common counts in assumpsit.—*Stout v. St. Louis Tribune Co.*, 342.
17. *Practice, civil—Petition—Amendments, when relate back—Limitations*—When an amendment to a petition in a suit for damages, (W. S., 519, § 2,) sets up no new matter or claim, but is merely a variation of the allega-

PRACTICE, CIVIL—PLEADING. Continued.

tions affecting a demand already in issue—as where by the original petition a party was assigned to the wrong side of the case, and the mistake was corrected—it relates to the commencement of the suit, and the running of the statute of limitations is arrested at that point. (*Buel v. St. Louis Transfer Company*, 45 Mo., 562, affirmed.)—*Crockett, et al. v. St. Louis Transfer Co.*, 457.

18. *Practice, civil—Pleadings—Statement of cause of action.*—The petition alleged that the defendant, a railroad company, negligently and carelessly ran over and killed some of the cattle of the plaintiff, and that the same was done at a part of the road that was not inclosed by a lawful fence, and that was not a public road crossing. *Held*, that the petition set out a good cause of action.—*Aubuchon v. St. Louis & Iron Mountain Railroad Co.*, 522.

19. *Practice civil—Trials—Pleading—Confession and avoidance—Burden of proof.*—The burden of proof is on a defendant who in his answer confesses and avoids the allegations of the petition.—*St. Louis Tow Company v. The Orphans Benefit Ins. Co.*, 529.

See Arbitration and Award, 1, 3; Equity, 1; Garnishment, 1; Practice, Civil—Trials, 8, 14.

PRACTICE, CIVIL—TRIALS.

1. *Practice, civil—Counts—Verdict, etc.*—The rule that where a petition contains more than one count, there should be a separate verdict on each count, only applies where the counts are for separate and distinct causes of action.—*Brady v. Connelly, et al.*, 19.

2. *Jury—Notes of evidence given to, etc.*—It would undoubtedly be improper to permit a jury to take the attorney's notes of evidence without the consent of the parties or their attorneys. But where such consent is given, the circumstances cannot be afterward urged as an objection to the verdict.—*Baker v. Rice*, 23.

3. *Practice, civil—Instructions, scope of.*—Instructions should be given with reference to the whole case, and not with reference only to a few of the facts involved.—*Raysdon v. Trumbo*, 35.

4. *Practice, civil—Trial—Jury, waiver of.*—Where defendant objected to going into the case, and took no further action in the case except to watch its progress and the clerk's entry was, "neither party requiring a jury the case is submitted to the court." *Held* that this was a sufficient waiver of trial by jury.—*Town v. Moore*, 118.

5. *Practice, civil—Parties—Appearance of—Trial.*—A party must either appear at a trial and abide the consequences or not appear. He cannot occupy an ambiguous position, partly appearing and partly not appearing.—*Id.*

6. *Practice civil—Trial—Instructions—Answer—Mechanic's lien.*—Instructions in a trial in a mechanic's lien suit, alleging that the work was done under two contracts, and that the first is barred, although the answer had admitted that all the work was done under one contract, are inadmissible.—*Westhus v. Springmeyer, et al.*, 229.

7. *Practice, civil—Trials—Instructions—Negligence.*—When the facts are so clear and decided, that the inference of negligence is irresistible, it is the duty of the judge to decide; but when the facts, or the inference to be drawn from them, are in any degree doubtful, the whole matter should be submitted to the jury under proper instructions.—*Barton v. St. Louis & I. M. R. R. Co.*, 253.

8. *Practice, civil—Trials—Pleadings—Evidence—Instructions.*—If the evidence shows a different state of facts from those contained in the pleadings, and a party to the suit desires instructions in accordance with those facts, he must first amend his pleadings by leave of court.—*Budd, et al. v. Hoffheimer*, 297.

9. *Practice, civil—Trials—Instructions, not covering all the issues.*—An instruction, calling for a verdict yet not covering all the issues in the case, is objectionable, unless cured by other instructions.—*Id.*

10. *Practice, civil—Trials—Instructions—Amount of verdict.*—When a party

PRACTICE, CIVIL--TRIALS. Continued.

- sues under a contract for the amount of compensation fixed by the contract, are instruction that the verdict be for that amount, if the jury find for the plaintiff, is correct.—*Id.*
11. *Practice, civil—Trial—Evidence—Link in the chain of testimony.*—Evidence that may form a link in the chain of testimony should be admitted, though not sufficient in itself to establish the defense, and although no disclosure is made at the time of an intention to prove the additional facts to establish the defense.—*Id.*
 12. *Practice, civil—Trials—Evidence, conflicting—Admissible testimony rejected—New trials.*—When in a case where the evidence is conflicting, the court excludes admissible testimony, but afterwards upon re-assembling after a recess, decides to admit it, but the witness does not appear, and it does not appear that the party had any opportunity to supply this testimony, the motion for a new trial should be granted.—*Id.*
 13. *Practice, civil—Trials—Instructions—Misleading.*—Instructions, which are likely to confuse and mislead the minds of the jury, should not be given.—*Clarke v. Kitchen*, 316.
 14. *Practice, civil—Trials—Verdict—Pleadings.*—A verdict against the admissions of the pleadings cannot be suffered to stand.—*Foley, et al. v. Alkire, et al.*, 317.
 15. *Practice, civil—Pleadings—Verdict—Replication, nunc pro tunc.*—If where replication was required, it was not filed, yet a court should not for that cause set aside a verdict, but should allow a replication of general denial to be filed *nunc pro tunc* to aid the verdict.—*Id.*
 16. *Practice, civil—Trials—Evidence—Testimony, anticipative—Offer to prove.*—When evidence is offered, which is inadmissible except by the proof of other facts, and there is no offer, or intimation given of an intention to prove such other facts, it is not error to reject the evidence.—*Pier v. Heinrichoffen*, 333.
 17. *Practice, civil—Trials—Evidence—Quantum meruit—Contract produced—Liability of defendant.*—If a plaintiff sues on a *quantum meruit*, and yet the contract is produced on a trial, if any fact necessary to establish defendant's liability under the contract is not proved, the plaintiff cannot recover.—*Stout v. St. Louis Tribune Co.*, 342.
 18. *Practice, civil—Trials—Evidence—Contracts—Justices courts—Circuit Court—Allegata—Probata.*—In trials in the Circuit Court on appeals from Justices Courts in actions of assumpsit, the evidence must prove the allegations necessarily made if the action had been first brought in the Circuit Court, where pleadings are required.—*Id.*
 19. *Practice, civil—Trials—Instructions must not assume facts not in evidence.*—Instructions which assume the existence of facts which are not in evidence are improper.—*Washington Mutual Fire Ins. Co. v. St. Mary's Seminary*, 480.
 20. *Practice, civil—Trials—Evidence, introduction of.*—The introduction of evidence in chief, by the plaintiff after the close of defendant's evidence, is a matter largely in the discretion of the trial court, but it might be error if it worked injustice.—*Burns v. Whelan*, 520.
 21. *Practice, civil—Trials—Instructions—Facts in evidence.*—Instructions should always be framed with reference to the facts in evidence.—*Porter v. Harrison*, 524.
 22. *Practice, civil—Trials—Instructions taken together—Whole case.*—It is sufficient if the instructions taken together present the whole case in a way that is not calculated to mislead.—*Id.*
 23. *Practice, civil—Trials—Pleadings—Confession and Avoidance—Burden of proof.*—The burden of proof is on a defendant who in his answer confesses and avoids the allegations of the petition.—*St. Louis Tow Co. v. The Orphans Benefit Ins. Co.*, 529.

See Practice, civil—New Trials.

PRACTICE, CRIMINAL.

1. *Criminal law—Cause, dismissal of—Fees—Agreement—Mandamus.*—In prosecutions for misdemeanors, where the proceedings were dismissed, an agreement by defendant with the Circuit Attorney to pay all costs including that officer's fee, would be contrary to public policy, and in case of the insolvency of defendant *mandamus* will not lie against the county judges to compel the payment of the fee.—*State ex rel. Woods v. Warramore*, 27.
2. *Practice, criminal—Evidence—Negative averments.*—Where the subject matter of negative averment lies peculiarly within the knowledge of the other party, it is taken as true, unless disproved by that party.—*State v. Lipscomb*, 32.
1. *Practice, civil—Trials—Evidence—Order of, discretionary with court.*—The order and manner of introducing testimony is always a matter resting largely in the discretion of the court.—*State v. Linney*, 40.
4. *Criminal law—Homicide—Self defense no justification, when.*—A party who seeks and brings on a difficulty, cannot avail himself of the doctrine of self-defense, in order to shield himself from the consequences of killing his adversary, however imminent the danger in which he may have found himself in the progress of the affray.—*Id.*
5. *Criminal law—Homicide, cruel and unusual—Jury.*—What constitutes a cruel and unusual manner of killing, is properly left to the jury to determine.—*Id.*
6. *Verdict, modification of by the Court.*—When the jury assess an imprisonment for less term than the law allows, they may modify their verdict under the direction of the court.—*Id.*
7. *Criminal law—Homicide—Time of counsel in addressing jury.*—The Court may limit the time of counsel in addressing a jury in a murder case.—*Id.*
8. *Practice, criminal—Appeals—Final judgments—Demurrers—Indictments.*—Where a demurrer to an indictment is sustained, but no final judgment is given on the demurrer, an appeal will be dismissed.—*State of Missouri v. Love*, 106.
9. *Practice, criminal—Court of Criminal Correction of St. Louis County—Justices of the Peace—Disturbing the peace.*—A. was prosecuted before a Justice of the Peace in St. Louis County, for disturbing the peace of a neighborhood, was convicted, and appealed to the Court of Criminal Correction; *Held*, though the Justice had jurisdiction to commit for trial before said Court, but not to try, yet said court should try the case on the information filed before the Justice, or on a new one, disregarding the former trial. [*State vs. Barada*, 49 Mo., 504, affirmed.]—*State vs. Schuerman*, 165.
10. *Practice, criminal—Evidence—Abandonment of wife—Divorce, suit for.*—In a prosecution under the statute for abandonment of his wife, evidence that the defendant has brought a suit for divorce against his wife, which is still pending, is no defense.—*State vs. Gunzler*, 172.
11. *Practice, criminal—Information—Definiteness.*—A criminal information should be sufficiently definite to put the defendant in possession of the charge for which he is held to answer.—*State vs. Rochforde, et al.*, 199.
12. *Evidence—Indictment—Good character, effect of.*—If the jury is satisfied of the prisoner's guilt from all the other facts and circumstances detailed in evidence, his good character cannot be looked to as a ground of acquittal.—*State vs. McMurphy*, 251.
13. *Practice, criminal—Costs—Dismissal at cost of defendant—Fee of Circuit Attorney.*—When a proceeding on indictment is dismissed by agreement at defendant's costs, the fee to which the circuit attorney is by law entitled in case of conviction, is not taxable as part of the costs. His right to his fee depends upon conviction.—*State vs. Foss*, 416.
14. *Practice, criminal—Assault and battery—Complaint—Affidavit before a notary sufficient.*—An affidavit to a complaint for assault and battery sworn to

PRACTICE, CRIMINAL. Continued.

before a Notary Public, is sufficient to authorize the issue of a warrant by a Justice of the Peace.—*State vs. Mullen*, 480.

See Crimes and Punishments.

PRACTICE—SUPREME COURT.

1. *New trial—Objections not appearing—Result.*—Objections not raised on motion for new trial will not be considered by the Supreme Court.—*Brady v. Connolly*, 19.
2. *Practice, civil—Exceptions, bill of—Objections saved.*—This court will regard no errors, except those patent of record, unless saved by bill of exceptions.—*Tower v. Moore*, 118.
3. *Practice civil—Supreme Court—Evidence.*—In law cases this court will not weigh the evidence.—*Oakes v. The Mound City Mutual Life Ins. Co.*, 237.
4. *Practice, civil—Supreme Court—Reversal—Improper evidence.*—This court will not reverse a case on account of the admission of improper evidence, when such evidence cannot have prejudiced the case of the appellant.—*Carpenter v. Rynders*, 278.
5. *Supreme Court—Testimony, weight of—Written instruments, legal effect of.*—This court in law cases will not judge of the weight of testimony, but where the evidence consists of written instruments, it will look into them to see whether they were interpreted and construed according to their legal effect.—*Willi v. Dryden, et al.*, 319.
6. *Practice civil—Supreme Court—Evidence, weight of.*—In a law case, this court will not decide upon the weight of the evidence, when there was evidence on both sides.—*Capelle v. Brainard*, 479.
7. *Practice, civil—Court, Supreme—Re-trial—Expenses.*—Where the cost of a re-trial would be almost as great as the amount in controversy, this court will not interfere, unless it clearly appear that the jury have been misled to the prejudice of the appellant.—*Porter v. Harrison* 524.
8. *Practice, civil—Bill of exceptions—Filing after the proper time—Suprem Court.*—The Court will not notice a bill of exceptions filed after the proper time.—*Hoffelman v. Frank*, 542.
Practice civil—Supreme Court—Submission on record.—A cause cannot by agreement be submitted to this court on the record. The law requires that a statement and brief be filed.—*Disse v. Frank*, 551.
 See Practice, civil—Appeal; Practice, civil—New Trials; Practice, criminal, 8.

PRESUMPTIONS; See Contracts, 11; Evidence, 2; Land and Land Titles, 6.

PRICE-CURRENT; See Evidence, 5.

PROCESS; See Limitations, 2.

PROMISSORY NOTES; See Bills and Notes.

PROTEST; See Bills and Notes; Practice, civil—Pleading, 14.

Q.

QUO WARRANTO; See Officers, 1, 2.

R.

REAL ESTATE AGENT; See Brokers, 4; Contracts, 8.
RECEIVER.

1. *Receiver—Cannot sue, when.*—A receiver cannot sue in a foreign jurisdiction for the property of the debtor.—*Farmers' & Mechanics' Insurance Co., to use, etc. v. Needles*, 17.



RECORD; See Land and Land Titles, 8, 9; Practice, civil.

RELEASE; See Accord and Satisfaction, 2.

REPLEVIN; See Constable, 2, 3, 4.

REVENUE.

1. *Practice, civil—Equity, bills in—Parties—Courts, County, acts of—Tax-payers, rights of—Attorney General.*—Tax-payers can file bills in equity to annul illegal acts of County Courts, when such acts will increase the taxation, and the State is not a necessary party to such suits.—*Newmeyer et al. v. Mo. & Miss. R. R. Co., et al.*, 81.
2. *Taxes—Schools—County Clerk—Collector.*—Under the act of 1867, [now changed] in relation to schools, [W. S., (1870) 1265,] it was the duty of the County Clerk to extend the amount of the school tax on the assessment books. The Auditor had no jurisdiction in the matter, and his mandate would not protect the collector in proceeding to collect money, as such taxes.—*Brown v. Harris*, 306.
3. *Officers, ministerial—Courts, mandates of—Responsibility.*—A ministerial officer is protected in executing the mandate of the Court which has power to issue such a mandate. *Id.*
4. *Money brokers—Licenses—Counties—State.*—Under the Statutes (W. S., 247 § 1; *Id.*, 1196, § 76,) the county courts are empowered to levy taxes and exact licenses from money brokers, for State and county purposes.—*State v. Knox*, 418.
5. *Revenue—License—Omission to levy tax—May be supplied afterwards.*—The omission by the County Court to levy a tax upon licenses, in making a general levy, does not extinguish their authority, and they can cure the omission and make a levy subsequently.—*State ex rel. v. Maguire*, 420.
6. *Revenue—License—Tax upon, when collected—Incumbrance.*—When a tax is levied on a license it becomes an incumbrance upon it, and the proper time to make the collection, is at or before the delivery of the license.—*Id.*
7. *Statutes—License—Courts, County, orders of—Validity of, if made before statute authorizing goes into effect.*—An order of a County Court requiring licenses and assessing a tax therefor, made before the statute authorizing such order goes into effect, is null and void.—*Neef v. Maguire*, 493.
See *St. Louis, City of*, 1, 2, 5; *Schools and School Lands*, 1.

S.

ST. LOUIS, CITY OF.

1. *Authority delegated—St. Louis City of—Charter—Ordinances.*—The charter of the City of St. Louis authorized the construction of sewers in said city, the dimensions to be determined by ordinance of the City Council; *Held*, that an ordinance leaving the determination of the dimensions to the City Engineer would create no liability on the part of the property owners to pay for the work done. [*City of St. Louis, to use of Murphy vs. Clemens*, 43 Mo. 395, and *Sheehan vs. Gleeson*, 46 Mo. 100, affirmed.]—*City of St. Louis v. Clemens*, 133.
2. *Laws retrospective—Constitution of Missouri.*—Certain sewers were built in the City of St. Louis under invalid ordinances, creating no liability on the part of property owners, and afterwards the legislature passed an act authorizing the city to re-assess the sum remaining unpaid on the real estate benefited by the improvement; *Held*, that the act of the legislature was retrospective and void under the State Constitution. (Art. 1, § 28.)—*Id.*
3. *St. Louis, City of—Ordinances—Improving streets—Charter.*—The City Council of St. Louis passed an ordinance directing the City Engineer to have a street graded, &c., according to law, and already an ordinance existed defining the manner of doing such work, &c. *Held*, that this ordinance is valid. [*Sheehan v. Gleeson*, 46 Mo., 100, affirmed.]—*Moran v. Lindell, et al.*, 229.

ST. LOUIS, CITY OF. Continued.

4. *St. Louis City of—Charter—Improving streets—Vicinity of the property.*—A property owner cannot refuse to pay the special tax for street improvements, because the centre of the street is improved, but the improvements do not extend to the sidewalk. The city authorities are the proper judges of how much it is necessary to do.—*Id.*
5. *St. Louis City of—Charter—Ordinances—Sewers—Special Taxes.*—A special tax-bill was issued for the construction of a sewer in the city of St. Louis. The City charter then in force provided, that sewers should be of such dimensions as might be prescribed by ordinance, and might be changed, enlarged or extended. The work was begun under a defective ordinance, but during its progress another ordinance was passed curing the defect, and all the work was in conformity with the latter ordinance. *Held*, that the tax-bill was valid.—*City of St. Louis v. Schoenemann*, 348.
6. *Statutes, construction of—City of St. Louis, charter of—Opening streets—Assessment of benefits to the city.*—The provision of the charter of the City of St. Louis, providing that not more than ten per cent. of the benefits accruing from the opening of a street shall be assessed against the City, is valid. [*Uhrig vs. City of St. Louis*, 44 Mo., 458, affirmed.]—*State, ex rel. v. City of St. Louis, et al.*, 574.
7. *Land Commissioner—Charter of City of St. Louis—Ordinance—Jury, selection of.*—The charter of the City of St. Louis provided that the benefits accruing from the opening of streets should be ascertained by the Land Commissioner by a jury, by proceedings prescribed by ordinance, and an ordinance of the City directed the Mayor of the City to furnish the Marshal summoning the jury with the names of proper persons. *Held*, that a jury so procured was a legal jury, but the Land Commissioner was not required to receive such jurors, unless they were competent and qualified.—*Id.*

See Schools and School Lands, 3; Statute, construction of, 6, 8.

ST. LOUIS COUNTY; See Mechanics' Liens, 1.

ST. LOUIS LEGAL RECORD; See Mortgages and Deeds of Trust, 2, 3.

SALARIES; See Clerk, Circuit, 1; Officers, 1, 2.

SALES.

1. *Sale on condition—Does not pass title till when.*—A sale and delivery of goods on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the vendee, until the condition is performed; and the vendor in case the condition is not fulfilled has a right to repossess himself of the goods, both against the vendee and his creditors; and if guilty of no neglect, may recover the goods so sold even from an innocent purchaser.—*Ridgeway v. Kennedy*, 24.
2. *Alienation of property—By-law of bank prohibiting—Restraint of trade.*—The right of alienation is an incident of property, and a by-law of a bank prohibiting the alienation of stock therein, or putting restrictions thereon, is void as being in restraint of trade.—*Moore v. Bank of Commerce*, 377.

See Mortgages and Deeds of Trust, 2, 3, 4; Partnership, 4; Sheriffs' Sales.

SCHOOLS AND SCHOOL LANDS.

1. *Taxes for schools—County Courts—Correction of assessments.*—County Courts have no power to alter the assessment of taxes to build school-houses, merely on the alleged ground that the school-house was unnecessary; the decision of that question is left to the local directors.—*Petition of Powers, et al.* 218.
2. *Taxes—Schools—County Clerk—Collector.*—Under the act of 1867, [now changed] in relation to schools, [W. S., (1870) 1265.] it was the duty of the County Clerk to extend the amount of the school tax on the assessment books. The Auditor had no jurisdiction in the matter, and his mandate would not protect the collector in proceeding to collect money, as such taxes.—*Brown v. Harris*, 306.

SCHOOLS AND SCHOOL LANDS. Continued.

2. *Corporations, municipal—Board of President and Directors of St. Louis Public Schools—County Court of St. Louis County, Justices of—Session Act, approved March 14, 1869, and acts amendatory thereof, construction of—School Districts—Corporations organized for the purpose of education only.*—The Board of President and Directors of St. Louis Public Schools, school districts and corporations organized for the purpose of education only, are not municipal corporations in the sense of Session Act, approved March 14, 1869, and the acts amendatory thereof, which declare that no person shall be eligible to the office of Justice of the County Court of St. Louis County, who at the time of his election shall hold any office under a Municipal or Railroad corporation created by the laws of the State of Missouri.—*Heller v. Stremmel*, 309.

SEAL; See Notary Public, 1.

SERVICE OF PROCESS; See Limitations, 2.

SEWERS; See St. Louis, City of, 1, 2, 5.

SHERIFF; See Executions, 3, 4; Judgments, 2; Limitations, 2; Sheriffs' Sales, SHERIFF'S SALES.

1. *Execution—Land, repeated sales of, under a difference in bids—Suit for, etc.*—Where land exposed for sale under an execution is bid off, but the money is not paid over, and the land is re-sold under the same execution, to the same bidder, but for a less sum, if the amount finally paid is sufficient to satisfy the judgment and costs, the defendant in execution will be entitled to maintain a suit in equity for the difference in the bids.—*Strawbridge v. Clark*, 21.
2. *Land, sale of—Successive liens on—Surplus fund—Belong to whom.*—Where there are several liens on a tract of land, and it is sold under one of them, the surplus, after paying the lien under which it was sold, belongs in equity to the next subsequent liens, in the order of their priority. *Id.*
3. *Deed—Judgment—Variance not fatal, when.*—A sheriff's deed is not invalid because it recites a judgment against "Smith & Haliburton," while the record in the cause shows a judgment against "Jacob Smith and Wesley Haliburton."—*Union Bank v. McWharters*, 34.
4. *Sheriff's sales, Validity of—Purchaser under.*—A purchaser at a sheriff's sale looks only to the judgment, execution, levy, and sheriff's deed. All other questions are between the parties to the judgment and the sheriff.—*Lenox et al. v. Clarke*, 115.
5. *Sheriff's sales, validity of—Erroneous judgment—Collateral proceedings.*—Where a sheriff sells land under a judgment, erroneous in the fact that it was a joint judgment whereas only one defendant was served, such judgment is not void as to the defendant served, and can only be set aside as to him, by direct proceedings for that purpose, and cannot be attacked in a collateral proceeding. *Id.*

SLANDER; See Partnership, 5.

STATUTE, CONSTRUCTION OF.

1. *Statute, construction of—Acts of Legislature—Enacting clause—Not essential to the validity of the act.*—The provision of the constitution of Missouri, (Art. 4, § 26;) declaring that the style of the laws of this State shall be "Be it enacted" etc., is directory and not mandatory, and an Act regularly passed by the Legislature, may be valid when this clause is omitted.—*City of Cape Girardeau v. Riley, et al.*, 424.
2. *Statute, construction of—Act construing a former act, not an original one.*—The revision of a law does not have the effect of making the revised law entirely original, so as to be construed as though none of its provisions had effect but from the date of the revised law; when a former provision is contained, in a revised law it operates only as a continuance of its existence, and not as an original act.—*Id.*
3. *Statutes, construction of—Legislature—When statute takes effect.*—The statute (2 W. S., 894, § 4,) declaring that acts of the Legislature shall not take effect

STATUTE, CONSTRUCTION OF. Continued.

- till ninety days after passage, unless a different time is appointed by the act, is valid, and is no restriction on the power of the Legislature.—*Neef v. Maguire*, 493.
4. *Statutes—Licenses—Courts, County, orders of—Validity of, if made before statute authorizing goes into effect.*—An order of a County Court requiring licenses and assessing a tax therefor, made before the statute authorizing such order goes into effect, is null and void.—*Id.*
 5. *Statute, construction of—Quo Warranto—Attorney General, information by—Act of Feb. 21, 1873.*—The act of Feb. 21, 1873, prohibiting the drawing or paying of a warrant for the salary attached to a State office, when said office is contested or disputed by two or more persons claiming title thereto, or by information in the nature of quo warranto, does not apply to an information filed by the attorney general ex-officio.—*State ex rel. Vail, v. Clark*, 508.
 6. *Ordinances—Ordaining clause, omission of—Act directory.*—An ordinance of a city is not invalid, because the ordaining clause is omitted; the law requiring such a clause, but not declaring the law void if that form is not pursued, is directory. (*City of Cape Girardeau v. Riley*, p. 424—affirmed)—*City of St. Louis v. Foster*, 513.
 7. *Statutes validity of—Forms prescribed—Departure from—Ordinances—Authentication—Law directory.*—A statute authenticated in the manner pointed out by law cannot be impeached by showing a departure from the forms prescribed by the constitution in the passage of the law; and the same principle applies to municipal corporations. (*Pacific Railroad v. Governor*, 23 Mo. 353, affirmed.) Such provisions or laws are directory, if there is no provision declaring such laws or ordinances void, if the said forms are not complied with.—*Id.*
 8. *Ordinances—Revision of—Continuity.*—When a former law is included in a revised law the revision has not the effect of breaking the continuity of those provisions which were in force before.—*Id.*
 9. *Ordinances—Collation—St. Louis, City of—Publication—Seal—Proof.*—When the ordinances of the City of St. Louis are collated and published by authority of the city they are admissible in evidence without any seal or attestation.—*Id.*
 10. *Statute, construction of—When retrospective.*—Statutes are not to be construed as having a retrospective effect, unless the intention is clearly expressed that they shall so operate, and unless the language employed admits of no other construction.—*State ex rel. Blakeman, v. Hays*, 578.
- See ATTACHMENT, 1, (W. S. 1009, § 181).
 CORPORATIONS, 4, (W. S. 293, § 22;) 5, (W. S. 336, § 13).
 DAMAGES, 5, (W. S. 519, § 2), 6, (W. S. 520, § 2).
 GARNISHMENT, 1, (R. C. 1855, p. 260).
 HUSBAND AND WIFE, 4, (W. S. 1034).
 LAND AND LAND TITLES, 12, 13, 14, 15, (Acts of Congress).
 LEASE, 3, (W. S. 880, § 15).
 LIMITATIONS, 2, (W. S. 920, § 24).
 MECHANICS' LIENS, 2, (W. S. 907-8, §§ 1-4).
 OFFICERS, 1, (Act, Feby. 21, 1873, concerning payment of salaries of State officers).
 REVENUE, 2, (W. S. 1263), 4, (W. S. 247, § 1; *Id.* 1196, § 76).
- STOCK; See Banks and Banking, 1, 2; Corporations, 2.
 STOCK-HOLDER; See Corporations, 2, 3, 4, 5.
 STREETS; See St. Louis, city of, 3, 4, 6, 7.
 SUNDAY; See Justices' Courts, 3.
 SURETIES; See Bonds, 1, 2; Bonds, Official, 1; Landlord and Tenant, 6; Practice, civil—Pleading, 8, 9.
 SURVIVORSHIP; See Husband and Wife, 1.

T.

TAXES; See Revenue.

TIME, COMPUTATION OF; See Justices' Courts, 3.

TRESPASS.

1. *Trespass—Fencing, removal of—Possession, etc.*—An action of trespass under the statute for removing certain fencing, will not lie against a defendant who is in actual possession of the premises on which the fence was built. In such case the remedy is by ejectment.—*Brown v. Carter*, 46.

See Land and Land Titles, 3.

TRUSTS AND TRUSTEES.

1. *Trusts and trust funds—Bank deposits—Consent of cestui que trust—Transfer of certificates of deposit.*—A. owing B. money on collections, made a special deposit of that amount in a bank, subject to his own order which he intended for B. *Held*, by the consent of B. to this action, the money became his, and after the indorsement of the certificate of deposit to him, his title thereto became complete at law.—*Phillips v. Franciscus, et al.*, 370.
2. *Equity—Trust funds, diversion of—Cestui que trust—Third party.*—Third parties cannot for their own protection require the *cestui que trust* to pursue the proceeds of trust funds in other investments; the *cestui que trust* have their option to do so, or to hold the trustees liable.—*Barr et al. v. Cubage, et al.*, 404.

See Limitations, 5, 6; Mortgages and Deeds of Trust.

V.

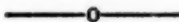
VENDORS' LIEN; See Land and Land Titles, 2.

VERDICT; See Practice, civil—New Trials, 2; Practice, civil—Trials; Practice, criminal, 6.

W.**WILLS.**

1. *Wills—Establishment of—Witnesses—Beneficiaries competent.*—Beneficiaries under a will being parties to the action, are competent witnesses in establishing it. [*Garvin v. Williams*, 50 Mo. 206 affirmed.]—*Gamache v. Gambs, Admr. et al.*, 287. *PER CURIAM, JUDGE EWING DISSENTING.*

WITNESSES; See Evidence; Practice, civil—Trials, 12; Wills.



1.
at
n

1.
1.
e
n

1.
o
f

1.

1.
1.